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UNITED STATES DISTRICT COURT
 NORTHERN DISTRICT OF CALIFORNIA
 SAN FRANCISCO DIVISION

CALIFORNIA TRIBAL FAMILIES COALITION,
 YUOK TRIBE, CHEROKEE NATION, FACING
 FOSTER CARE IN ALASKA, ARK OF
 FREEDOM ALLIANCE, RUTH ELLIS CENTER,
 and TRUE COLORS, INC.,

Plaintiffs,

v.

ALEX AZAR, in his official capacity as Secretary of
 Health and Human Services, LYNN A. JOHNSON,
 in her official capacity as Assistant Secretary for the
 Administration for Children and Families, U.S.
 DEPARTMENT OF HEALTH AND HUMAN
 SERVICES, and ADMINISTRATION FOR
 CHILDREN AND FAMILIES,

Defendants.

Case No.

**COMPLAINT FOR DECLARATORY
 AND INJUNCTIVE RELIEF**

Administrative Procedure Act Case

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1 Plaintiffs California Tribal Families Coalition, Yurok Tribe, Cherokee Nation, Facing
 2 Foster Care in Alaska, Ark of Freedom Alliance, Ruth Ellis Center, and True Colors, Inc., by and
 3 through undersigned counsel, hereby allege as follows:

4 **I. INTRODUCTION**

5 1. More than 430,000 children are removed from their homes and placed in foster care
 6 every year. As a result of systemic inequities, marginalized populations are significantly over-
 7 represented in the child welfare system and experience worse outcomes once they become
 8 involved with the system. This includes children of color, children from low-income families,
 9 and—of particular relevance to this case—lesbian, gay, bisexual, transgender, queer/questioning,
 10 and two-spirit (“LGBTQ+”) youth and American Indian and Alaska Native (“AI/AN”) youth.¹

11 2. To address long-standing concerns about the safety, health, and long-term
 12 outcomes of children in care and the efficacy of states’ child welfare systems, Congress requires
 13 Defendant Department of Health and Social Services (“HHS”) to collect “comprehensive national
 14 information” on the number of youth in foster care, their demographics and status, and their
 15 experiences in care. 42 U.S.C. § 679(c)(3). This data collection, known as the Adoption and Foster
 16 Care Analysis and Reporting System (“AFCARS”), is used to inform policy and direct resources
 17 at both the federal and state level and to ensure that the \$10 billion per year of taxpayer funding
 18 that goes to support state child welfare systems is spent effectively.

19 3. Until 2016, AFCARS was operating under regulations issued in 1993. For years,
 20 HHS and its division Defendant Administration for Children and Families (“ACF”) had
 21 recognized that those regulations were outdated and inadequate to capture the demographics of
 22 children in care nationwide and how they fared when placed out of home.

23 4. Between 1993 and 2016, a growing body of research funded by HHS and ACF, in
 24 addition to information from participants across the child welfare system, highlighted the

25
 26 ¹ LGBTQ+ is used throughout this complaint, except when quoting or referring to documents that use a different
 27 acronym. LGBTQ+ includes terms not listed above and reflects the variety of terms children and youth may use to
 28 describe themselves in terms of their sexual orientation, gender identity, and gender expression, such as pansexual,
 asexual, genderqueer, and nonbinary, among others. Two-spirit is an umbrella term that some AI/AN people use to
 describe themselves in relation to sexual orientation, gender identity, or gender expression, but is not a term used by
 all AI/AN people or tribes.

1 numerous systemic failures in foster care, including those for AI/AN and LGBTQ+ children and
2 youth. Among these systemic ills was an alarming rate of poor educational outcomes, justice
3 system involvement, commercial sexual exploitation or trafficking, and homelessness for children
4 in care; the greater likelihood of children of color being removed from their families and their
5 communities; and an ongoing shortage of foster and adoptive families and an over-reliance on
6 congregate care, including group homes and treatment facilities, as placements for children who
7 cannot safely be at home. Additionally, child welfare agencies frequently ignore the rights of
8 AI/AN tribes to participate in the foster care and adoption process when their children are
9 involved and to ensure their children's well-being and placement with family—rights that
10 Congress codified in the Indian Child Welfare Act (“ICWA”) in 1978, 25 U.S.C. § 1901 *et seq.*

11 5. Despite this research, nationwide data is lacking to measure and develop solutions
12 to problems, including the particular challenges faced by AI/AN LGBTQ+ youth and other
13 LGBTQ+ youth of color.

14 6. In 2016, after more than a decade of work, including thousands of interviews with
15 stakeholders and multiple notice-and-comment periods, ACF finalized a rule updating the
16 AFCARS regulations for the first time in nearly 25 years, addressing these and other issues. Of
17 particular note, the 2016 rule required child welfare agencies to report data on the sexual
18 orientation of foster youth aged 14 and older as well as legal guardians, foster parents, and
19 adoptive parents, and data showing how state child welfare agencies implement ICWA's
20 requirements, such as attempting to place AI/AN children with relatives or tribal members.

21 7. As ACF recognized when issuing the 2016 rule, the data would have immense
22 value to ACF and participants throughout the child welfare system—including the most vulnerable
23 among the hundreds of thousands of children in care across the country. The data would help
24 ACF, child welfare agencies, tribes, and organizations serving youth in foster care identify the
25 most pressing problems, direct their resources more effectively, understand how the intersection of
26 issues like sexual orientation and race affects experiences and outcomes, and work to ameliorate
27 some of the problems that drive youth into homelessness, involvement with the juvenile justice
28 system, sexual exploitation, and other traumatic experiences.

1 8. After a change in administration, however, ACF's decade of work has gone for
2 naught. Despite overwhelming support for the changes from tribes, organizations representing and
3 working with foster youth, LGBTQ+ civil rights groups, service providers, and other stakeholders,
4 Defendants delayed and then, in May 2020, rescinded large portions of the 2016 rule.

5 9. The May 2020 rule reversing much of the 2016 update is arbitrary and capricious.
6 Its analysis is riddled with errors and omissions, from a cost-benefit analysis that ignores any
7 consideration of the lost benefit to children and families of the abandoned data; to a failure to
8 consider the core statutory requirement that Defendants collect "comprehensive national
9 information" about the "demographics," "status," and "characteristics" of foster youth, 42 U.S.C.
10 § 679(c)(3); to a refusal to consider arguments and alternatives other than Defendants' favored
11 ones; to a failure to address substantive comments; to a mischaracterization of key documents; to
12 numerous unexplained departures from its previous analysis, research, and long-standing
13 positions.

14 10. For example, Defendants eliminated the requirement that child welfare agencies
15 collect voluntarily reported data on the sexual orientation of youth aged 14 and older, legal
16 guardians, and foster and adoptive parents. Their principal justification for this reversal was a
17 supposed concern that the questions were too sensitive to be asked of youth 14 and over or foster
18 parents, adoptive parents, and legal guardians, even on a voluntary basis. But the document that
19 they relied upon for this claim expressly approves the exact same questions as asked on an HHS
20 behavioral survey administered to youth. Moreover, ACF considered and rejected this concern
21 during the 2016 rulemaking, yet, in conflict with basic principles of reasoned decision-making,
22 Defendants refused to grapple with or rebut their prior analysis.

23 11. Similarly, Defendants eliminated most questions related to how child welfare
24 agencies treat children to whom ICWA applies. Although ACF had in 2016 found these questions
25 essential to guide its allocation of resources to help AI/AN youth, Defendants abandoned them
26 without any discussion of the value of the information being lost for AI/AN youth and the tribes
27 seeking to protect them.

28 12. Plaintiffs in this case include two federally recognized Indian tribes, a coalition of

1 36 tribes based in California, a foster youth and foster care alumni organization, and three
2 organizations that work with LGBTQ+ foster youth and/or youth who have experienced sex or
3 labor trafficking with the goal of improving their living conditions, connecting them with
4 educational and supportive services such as medical care and mental health counseling, helping
5 them advocate for themselves, and reducing the chances that they will end up homeless,
6 incarcerated, or otherwise severely harmed.

7 13. The data that Defendants have abandoned are irreplaceable for making these efforts
8 effective. As Defendants themselves recognized when requiring the data in 2016, both the sexual
9 orientation data and the ICWA data are crucial: the sexual orientation data for identifying and
10 addressing the drivers contributing to the over-representation of LGBTQ+ youth in the foster care
11 population and their disproportionately negative experiences while in care and for recruiting and
12 retaining potential foster and adoptive parents who are supportive of LGBTQ+ youth; and the
13 ICWA data for facilitating tribes' efforts to vindicate their and their children's rights and well-
14 being in individual cases and improving deficient and harmful practices at underperforming child
15 welfare agencies.

16 14. Without the data, organizations providing services to LGBTQ+ youth have no way
17 to determine whether they are reaching the full population of LGBTQ+ youth in child welfare
18 systems or to identify what programs and services are needed to reduce their over-representation
19 in care, poor treatment while in care, and worse outcomes. The lack of data disqualifies them from
20 some grants and makes it more difficult to obtain and deploy other funding for programs and
21 services, and impairs their ability to advocate for training, changes in practice, and law and policy
22 reform. Tribes have no idea how many of their children are in state systems, whether a court has
23 ordered ICWA to apply to them, and whether they have been placed into non-kin or non-tribal
24 families despite the ICWA's statutory placement preferences. And, most importantly, the harmful
25 experiences of many of the most vulnerable children in America continue unabated in the shadows
26 of the child welfare system, unexamined at the comprehensive, national level that AFCARS
27 requires.

28 15. Accordingly, and for the reasons set forth herein, Plaintiffs respectfully request that

1 the Court set aside the 2020 final rule as arbitrary and capricious under the Administrative
2 Procedure Act, 5 U.S.C. § 706(2)(A).

3 **II. JURISDICTION AND VENUE**

4 16. This Court has jurisdiction over this action pursuant to 5 U.S.C. § 702 and 28
5 U.S.C. § 1331.

6 17. Venue is proper under 28 U.S.C. § 1391(e)(1) because Plaintiff Yurok Tribe, the
7 largest federally recognized tribe in California, is located in and has reservation lands in Del Norte
8 and Humboldt counties. These counties are located within the Northern District of California.

9 **III. PARTIES**

10 18. Plaintiff California Tribal Families Coalition (“CTFC”) is a 501(c)(4) non-profit
11 membership association of 36 federally recognized tribes, including Plaintiff Yurok Tribe, and
12 three Tribal Leaders’ Associations located in California. CTFC’s broad mission is to promote and
13 protect the health, safety, and welfare of tribal children and families, which are inherent tribal
14 governmental functions and at the core of tribal sovereignty and governance. CTFC was formed to
15 carry out the recommendations of California’s ICWA Compliance Task Force, an independent and
16 tribal-led group comprised of tribal leaders, representatives, and advocates. Convened in 2015 at
17 the invitation of the California Attorney General, the Task Force’s central objective was to
18 identify ways to improve the implementation of ICWA and California’s corresponding state
19 legislation for the benefit of tribes, Indian families, and their children. The Task Force recognized
20 that tribal rights under ICWA continue to be frustrated four decades after the statute’s enactment,
21 leaving tribes unable to effectively protect their member children in state child welfare systems or
22 prevent their children from being removed from their communities unnecessarily. After
23 conducting listening sessions to identify gaps where tribes, Indian families, and their children were
24 left out of legal protections, the Task Force issued its recommendations in the form of a final
25 report (“Task Force Report”).

26 19. CTFC accomplishes its mission through a variety of activities guided by the Task
27 Force Report. Among other things, CTFC works to improve data collection on ICWA
28 implementation as recommended by the Task Force Report, which explained that the Task Force’s

1 ability to understand and improve ICWA implementation was severely hindered by a lack of data.
 2 The Report explained that the California child welfare system lacks “data sets essential to tracking
 3 ICWA compliance,” making it “much more difficult for tribes to guide policy and budget
 4 allocation processes to ensure compliance.”² The Report recognized that this problem would be
 5 addressed in part by ACF’s 2016 Final Rule adding ICWA data to AFCARS.³ As the successor
 6 organization to the Task Force, CTFC has a significant interest in ICWA data and has engaged in
 7 both state- and federal-level efforts to improve ICWA data collection, including by working with
 8 California’s Department of Social Services to develop and implement state-level data collection
 9 requirements once it became clear that ACF intended to gut ICWA data elements from the
 10 AFCARS reporting requirements, and by submitting comments opposing ACF’s proposal.⁴

11 20. CTFC also works in a myriad of other ways to address the challenges identified by
 12 the Task Force Report and would benefit greatly from the collection of ICWA data. For example,
 13 CTFC works to improve ICWA competency for various individuals and organizations working in
 14 the child welfare system, including by providing free ICWA training to child welfare agencies and
 15 social workers, and by advocating for policy changes, such as a revision of court rules that would
 16 mandate ICWA competency among attorneys, party representatives, and social workers. CTFC
 17 also works to address challenges faced by tribes in state courts when seeking to intervene in cases
 18 involving tribal children, including by securing the right of tribes to participate in courtroom
 19 proceedings, improving tribal access to case records, and ensuring that tribes obtain legal counsel.
 20 Additionally, CTFC advocates for state legislation and regulations that would improve outcomes
 21 under ICWA, such as a Foster Care Bill of Rights Amendment. Similarly, CTFC regularly
 22 engages with the California Department of Social Services to improve the agency’s ICWA

24 ² California ICWA Compliance Task Force, *Report to the California Attorney General’s Bureau*
 25 *of Children’s Justice* 98 (2017) (“Task Force Report”), [https://www.caltribalfamilies.org/wp-](https://www.caltribalfamilies.org/wp-content/uploads/2019/06/ICWAComplianceTaskForceFinalReport2017.pdf)
 26 [content/uploads/2019/06/ICWAComplianceTaskForceFinalReport2017.pdf](https://www.caltribalfamilies.org/wp-content/uploads/2019/06/ICWAComplianceTaskForceFinalReport2017.pdf).

27 ³ *Id.*

28 ⁴ CTFC, Comment Letter on Adoption and Foster Care Analysis and Reporting System
 (“AFCARS”) Notice of Proposed Rulemaking (June 17, 2019),
<https://www.regulations.gov/document?D=ACF-2018-0003-0297>.

1 policies and implementation, including enhanced oversight of the county-level subdivisions that
2 are ultimately responsible for complying with ICWA’s requirements. As explained further below,
3 CTFC’s ability to conduct trainings, engage in advocacy, and improve outcomes under ICWA
4 would be greatly improved if it had access to data on ICWA implementation.

5 21. Plaintiff Yurok Tribe (“Yurok” or “the Tribe”) is a federally recognized Indian
6 tribe located in Del Norte and Humboldt Counties in California. With 6,234 members and 1,279
7 reported households, the large majority of which are family or multi-family households, Yurok
8 Tribe is the largest Native American tribe in California. Yurok Tribe is committed to continuing
9 its tribal traditions, including respect for the dignity and individual rights of all persons living
10 within its jurisdiction.

11 22. Consistent with that mission, Yurok Tribe aims to help its tribal members and
12 families achieve independence and self-sufficiency. To do so, and to ensure that Yurok children
13 are safe and remain with their families and the Yurok community, the Tribe provides a variety of
14 services through its designee Yurok Health and Human Services (“YHHS”), a social services
15 agency that receives partial funding under a title IV–E “pass-through agreement” with the state of
16 California.⁵ As part of that work, YHHS collaborates with state child welfare agencies to ensure
17 that the state agency is properly implementing ICWA to protect Yurok children. The Tribe also
18 provides direct services to children eligible for tribal membership and their families, including, but
19 not limited to: intake and investigation of reports of abuse and neglect; services designed to ensure
20 the safety of children in their homes and placements; prevention services designed to reduce the
21 likelihood that a child will be removed from the home; referrals to other services to strengthen
22 families; case management services for children placed in the custody of YHHS; and court
23 intervention services designed to ensure YHHS involvement throughout the life of a child’s court
24 case.

25
26 _____
27 ⁵ As explained further below, *infra* ¶ 54, title IV–E of the Social Security Act is the principal
28 statutory provision through which the federal government funds state and tribal child welfare
agencies. While tribes can receive money directly from the federal government, they may also
receive such funding indirectly by entering into a “pass-through” agreement with the state.

1 23. Yurok Tribe also maintains a Wellness Court, with separate calendars for families,
2 adults, and youth, that provides additional services such as foster care placement, counseling
3 sessions, and drug testing. The Tribe also intervenes and participates in ICWA cases heard in state
4 courts throughout California and the Pacific Northwest.⁶ The Tribe's ICWA-eligible children live
5 across North America. As explained further below, Yurok's ability to work with state child
6 welfare agencies to improve ICWA implementation and provide services to its families and
7 children would be greatly improved if it had access to data on ICWA implementation.

8 24. Plaintiff Cherokee Nation is the sovereign government of the Cherokee people and
9 is the largest tribe in the United States, with more than 380,000 tribal citizens residing across the
10 country. Cherokee Nation is committed to protecting its inherent sovereignty; preserving and
11 promoting Cherokee culture, language, and values; and improving the quality of life for future
12 generations of Cherokee Nation citizens. To that end, Cherokee Nation provides a number of
13 governmental services, including health and human services, education, employment, housing,
14 economic development, and environmental protection.

15 25. Among other services, Cherokee Nation provides Indian Child Welfare services
16 under a direct title IV-E plan, including foster care and adoption services for Indian children. As
17 part of that work, Cherokee Nation engages in the following activities: (1) advocating for and
18 establishing the safest and most appropriate environment for the child; (2) providing referrals and
19 networking services to parents and children; (3) conducting home assessments to determine
20 whether a child's living environment is safe; (4) making recommendations to courts regarding a
21 child's best interest; (5) providing expert testimony in cases involving Indian children; (6)
22 monitoring case activity to ensure compliance with ICWA and other relevant state and tribal laws;
23 and (7) educating attorneys, court-appointed guardians, and families on their rights and
24 responsibilities within the judicial system to ensure the protection of Cherokee children under
25 federal and state law.

26 26. Cherokee Nation also has a nationwide Court Advocacy and Permanency Service

27 _____
28 ⁶ As discussed *infra* ¶ 82, under ICWA, every federally recognized tribe has a right of intervention
in state child custody proceedings that involve their children.

1 (“CAPS”) that provides advocacy for Cherokee families and children in tribal and state court
2 systems. To ensure that Cherokee children receive the protections offered under ICWA and similar
3 state laws, the CAPS program sends advocates to court hearings on behalf of Cherokee children,
4 provides planning services, and helps refer children and families to services designed to address
5 problems that contributed to the initial removal of a child. As explained further below, Cherokee
6 Nation’s ability to provide its advocacy and child welfare services would be greatly improved if it
7 had access to comprehensive ICWA data.

8 27. Plaintiff Facing Foster Care in Alaska (“FFCA”) is a 501(c)(3) non-profit
9 membership organization comprised of current and former foster youth. FFCA is dedicated to
10 improving the foster care system, developing leadership and self-advocacy skills among its
11 members, and creating a network of peer support that is a lifeline for many foster youth and
12 alumni. FFCA’s members include more than 300 current and former foster youth in Alaska,
13 including Alaska Native youth (who represent approximately 60 percent of youth in foster care in
14 Alaska despite making up only 16 percent of the general population), LGBTQ+ youth, and Alaska
15 Native LGBTQ+ youth. To represent the views of its members, FFCA is led by a Statewide Youth
16 Leadership Board composed of 9 elected FFCA members aged 15-24. FFCA’s staff and Board of
17 Directors oversee the organization’s non-profit operations and follow the direction of the Youth
18 Leadership Board to further the organization’s mission.

19 28. To advance its mission, FFCA staff and members conduct various activities. First,
20 FFCA regularly advocates at the state level for legislation, regulations, and policies that will
21 improve the safety, permanency, and well-being of youth in the foster care system, including
22 LGBTQ+ and Alaska Native youth. As part of that work, FFCA mentors its members to improve
23 their ability to advocate for themselves and for policy changes that will improve the experiences of
24 foster youth. For example, FFCA members have successfully advocated for millions of dollars to
25 be included in the state operating budget for transition-aged youth; those dollars have been
26 focused on housing, education, employment, mentorship, extended foster care, re-entry, and
27 increased staff positions in Alaska’s Office of Children Services (“OCS”), Alaska’s state child
28 welfare agency. FFCA members are currently working to secure passage of a foster youth bill of

1 rights that would include, among other things, the right: to be free from discrimination on the basis
2 of age, race, disability, religion, sexual or gender identity, foster care status, or family history; to
3 be placed in a safe, supportive, and stable environment; to practice the child's religion and engage
4 in cultural activities; and to consent to the use of medication. In addition to legislative advocacy,
5 the Youth Leadership Board meets with OCS officials on a quarterly basis to educate the agency
6 on the needs of youth in foster care and to collaborate to improve agency policies and practices.

7 29. Second, FFCA provides direct services and support to current and former foster
8 youth through trainings and peer support. For example, FFCA contracts with OCS to host
9 quarterly retreats through OCS's Independent Living Program designed to help foster youth
10 develop the skills and resiliency that are key to their transition to adulthood. Through interactive
11 sessions and presentations, FFCA's retreats focus on a variety of topics, such as reproductive
12 health, healthy relationships, cooking, career and job skills, and higher education.

13 30. Third, FFCA provides community education and training to ensure that individuals
14 involved in the child welfare system—such as child welfare staff, judges, child advocates, tribal
15 advocates, service providers, educators, and foster parents—have the tools to support foster youth
16 throughout their experience in the foster care system. In the past, such trainings have covered
17 topics such as the unique challenges faced by Alaska Native children, including reducing the over-
18 representation of Alaska Native children in the foster care population in Alaska, the importance of
19 cultural and educational continuity for children when moved to a new placement, and the ways in
20 which caregivers can provide safe and supporting environments for LGBTQ+ youth and reduce
21 the disproportionately high representation and poor outcomes of LGBTQ+ youth in care, including
22 by increasing the number of safe and supportive foster homes.

23 31. As explained further below, FFCA's ability to engage in advocacy, provide direct
24 services to youth, and educate adults in the child welfare system would be greatly improved if it
25 had access to data on ICWA implementation and sexual orientation.

26 32. Plaintiff Ark of Freedom Alliance ("AFA") is a 501(c)(3) non-profit organization
27 that works to end the sex and labor trafficking of children and young adults and to empower male
28 and LGBTQ+ survivors, as well as youth at risk, by providing a variety of services and economic

1 support to those young people. To that end, AFA provides services to communities, children,
2 LGBTQ+ youth, youth in and aging out of foster care, and young adult male survivors of violence,
3 human trafficking, and exploitation, with a particular focus on those experiencing homelessness,
4 with mental health disorders, or struggling with addiction. Relevant here, youth in the child
5 welfare system are particularly at risk of trafficking.

6 33. To accomplish its mission, AFA engages in a number of activities. First, it provides
7 a variety of support services to youth, including education, housing, mental health services, and
8 economic empowerment. Second, AFA provides preventative outreach, mentoring, and education
9 to youth at risk of exploitation as a result of homelessness, anti-LGBTQ+ discrimination, histories
10 of abuse, substance abuse, mental health challenges, barriers to employment, or involvement with
11 the criminal justice system. Third, because more than half of all youth exploited for commercial
12 sex identify as male, AFA provides community outreach and training in order to educate the
13 community, law enforcement, and service providers on (1) how to identify and engage with male
14 victims and others at risk of human trafficking and (2) how to report trafficking and otherwise
15 support marginalized youth. Fourth, given the high correlation between involvement with the
16 foster care system and the risk of trafficking, AFA provides education to child welfare system
17 professionals and stakeholders about male and LGBTQ+ youth and young adult survivors of
18 trafficking.

19 34. As explained further below, AFA's ability to provide its services would be greatly
20 improved if it had access to data on the sexual orientation of youth in the child welfare system.

21 35. Plaintiff Ruth Ellis Center ("Ruth Ellis") is a 501(c)(3) non-profit organization that
22 provides trauma-informed services to LGBTQ+ youth in Michigan, with an emphasis on youth of
23 color (given their over-representation in Michigan's child welfare and other government systems
24 of care), youth experiencing homelessness, youth in the child welfare and juvenile justice systems,
25 and youth experiencing other barriers to health and well-being. Ruth Ellis provides services
26 through five core programs.

27 36. First, Ruth Ellis runs a health and wellness center that provides fully integrated
28 primary and behavioral health care, including care for long-term medical issues, STI testing and

1 treatment, HIV prevention services, transition care, gender-affirming hormone treatment, birth
2 control, and screening for medical emergencies.

3 37. Second, Ruth Ellis' drop-in center provides support groups, case management, and
4 a safe place for LGBTQ+ youth and young adults to connect with each other and their community.

5 38. Third, Ruth Ellis operates a Center for Lesbian and Queer Women and Girls that
6 provides outreach and case management services to girls and women, including education,
7 workforce development, health and wellness, family/parenting support, and juvenile justice and
8 foster care support services.

9 39. Fourth, through the Ruth Ellis Institute, Ruth Ellis advocates for policies to reform
10 both Michigan's foster care system and nation-wide systems of care, including the child welfare
11 system, to ensure that LGBTQ+ youth can be safe and supported.

12 40. Fifth, Ruth Ellis operates several pilot programs designed to study how novel direct
13 services and trainings might improve outcomes for LGBTQ+ youth. For example, in recognition
14 of the importance of sexual orientation and gender identity data to its other programs, Ruth Ellis is
15 currently operating a pilot program to train foster care workers in three counties on collecting such
16 data in a culturally competent manner. Similarly, Ruth Ellis is conducting a pilot program to work
17 directly with the families of LGBTQ+ youth to improve family acceptance of their child's identity,
18 which is understood to play a significant role in improving outcomes for such youth, including
19 reducing the over-representation of LGBTQ+ youth in foster care. Ruth Ellis is currently shifting
20 from operating a group home specifically for LGBTQ+ youth who could not find supportive foster
21 home placements or need additional support to providing training and technical assistance on
22 LGBTQ+-supportive programming for group homes that serve all youth.

23 41. As explained further below, Ruth Ellis's programs would benefit from access to
24 sexual orientation data through AFCARS.

25 42. Established in 1999, Plaintiff True Colors, Inc. ("True Colors") is a 501(c)(3) non-
26 profit organization that works with child welfare agencies, other social services agencies, schools,
27 organizations, and communities to ensure that the needs of LGBTQ+ youth in Connecticut are
28 both recognized and competently met.

1 43. True Colors accomplishes its mission in a variety of ways. First, in collaboration
2 with Connecticut's Department of Children and Families ("DCF"), True Colors has established a
3 Safe Harbor Project designed to ensure that DCF staff and contractors provide competent, safe,
4 and supportive services to LGBTQ+ youth. To that end, the Safe Harbor Project provides trainings
5 on LGBTQ+ cultural competency for a variety of professionals (e.g., social workers, clinicians,
6 youth service providers, child welfare professionals, and educators), covering topics such as how
7 to balance professional responsibilities with personal beliefs, how to identify risks and challenges
8 specific to LGBTQ+ populations (e.g., a lack of supportive foster placements and homelessness),
9 and how to address sensitive situations involving LGBTQ+ youth in the child welfare system.

10 44. Second, True Colors regularly advocates for legislative, regulatory, and policy
11 reform through the Safe Harbor Project, which has established a Task Force whose sole purpose is
12 to identify and fill gaps in services for LGBTQ+ youth. In that role, the Task Force has
13 successfully advocated for the implementation of supportive policies at DCF, including policies
14 that prohibit DCF service providers from discriminating on the basis of sexual orientation and
15 gender identity and expression, as well as written protocols for serving transgender and non-binary
16 youth in congregate and foster care.

17 45. Third, through the Safe Harbors Taskforce, True Colors works to enlarge the pool
18 of foster homes for LGBTQ+ youth by recruiting affirming foster parents, including parents who
19 are themselves LGBTQ+, and providing them with training on LGBTQ+ issues.

20 46. Fourth, True Colors provides a number of direct services to LGBTQ+ youth,
21 including Connecticut's first mentoring program that pairs LGBTQ+ youth in out-of-home care
22 with an LGBTQ+ adult or ally, weekly activities designed to improve the overall quality of life for
23 LGBTQ+ youth in foster care by helping them to connect with their communities, and leadership
24 programs that empower LGBTQ+ youth to advocate for themselves and others. Youth
25 participating in True Colors' mentoring program reflect the over-representation of youth of color
26 in Connecticut's foster care system.

27 47. As explained further below, True Colors' trainings, advocacy, and direct services
28 would be greatly improved if it had access to sexual orientation data through AFCARS.

1 and nonprofit, child welfare agencies administer their own programs and provide for the best
2 interests of the children in their care.

3 54. The federal government spends nearly \$10 billion a year to support state child
4 welfare programs.⁹ The principal means through which Congress allocates this money are title IV–
5 E of the Social Security Act (the “Act”), which partially reimburses states for providing foster
6 care, adoption assistance, and guardianship assistance, and title IV–B, which provides grants to
7 states and tribes for child welfare services that protect children from abuse or neglect, preserve and
8 reunite families, and promote and support adoption. *See* 42 U.S.C. §§ 621, 624, 670, 674.
9 Agencies that receive this funding are known as “title IV–E agencies.”

10 55. One of the core goals of modern child welfare initiatives is permanency—that is,
11 long-term placement in a “legally permanent, nurturing family,” rather than care in foster
12 homes or congregate care.¹⁰ This can be achieved through family reunification, guardianship, or
13 adoption.

14 56. In spite of ACF’s work on behalf of children, child welfare disparities continue to
15 disproportionately impact certain groups of children. These disparities affect which children and
16 families are likely to enter the foster care system, which children achieve permanent placements,
17 how children are treated within the system, which children are trafficked or exploited within or
18 after exiting the system, and what outcomes those children experience.¹¹

19 **B. The Adoption and Foster Care Analysis and Reporting System**

20 57. The Adoption and Foster Care Analysis and Reporting System (“AFCARS”) is the
21 only source of national data on the almost 500,000 children in foster care or adopted through a
22

23
24 ⁹ Emilie Stoltzfus, Congr. Research Serv., *Child Welfare Funding in FY 2018* (July 30, 2018),
<https://fas.org/sgp/crs/misc/R45270.pdf>.

25 ¹⁰ Child and Family Services Reviews: Information Portal, *Achieving Permanency*,
26 <https://training.cfsrportal.acf.hhs.gov/section-2-understanding-child-welfare-system/3030>.

27 ¹¹ *See, e.g.*, Children’s Bureau, *Racial Disproportionality and Disparity in Child Welfare* 6 (2016),
https://www.childwelfare.gov/pubpdfs/racial_disproportionality.pdf; Children’s Bureau, *Human*
28 *Trafficking and Child Welfare: A Guide for Caseworkers* 4 (2017),
https://www.childwelfare.gov/pubPDFs/trafficking_caseworkers.pdf.

1 state agency.¹²

2 58. To maximize the benefit of its child welfare expenditures to improve the wellbeing
3 of children in foster care, Congress and HHS have long expressed an interest in collecting data to
4 understand the demographics, procedures, and challenges of the foster care and adoption system.
5 From the late 1940s through the early 1970s, the Children's Bureau collected this information
6 voluntarily.¹³ But this data was "characterized by variation from State to State in reporting periods,
7 the lack of common definitions for data elements and services, and inconsistent methodologies in
8 reporting." 58 Fed. Reg. at 67,913. These shortcomings "limit[ed] its usefulness for purposes of
9 planning or policy development at either the Federal or State levels." *Id.*

10 59. As a result, both ACF and state agencies were operating in the dark. "[P]ublic child
11 welfare systems in many of the States did not know how many children were actually in foster
12 care; how long they had been in care; where they resided; their race, age, sex and special needs; or
13 the plan for each child." *Id.* The results for youth were dismal:

14 [T]he public child welfare system had become a receiving and holding system for
15 children in foster care. . . . [T]housands of children remained in foster care with
16 little hope of being reunited with their parents or placed with adoptive families.
17 The prospect of adoption was particularly bleak if the child was a member of an
ethnic or racial minority group, an older child, a member of a sibling group, or
mentally or physically disabled.

18 *Id.*

19 60. Motivated by this "belief that the public child welfare system had become a
20 receiving and holding system for children in foster care," *id.*, Congress passed a series of laws
21 between 1978 and 1986 authorizing and then requiring HHS to develop a comprehensive reporting
22 system, which became AFCARS. *See* 42 U.S.C. § 679(c).

23 61. By statute, AFCARS must:

25 ¹² HHS, *The AFCARS Report No. 26*, 1 (2019),
26 <https://www.acf.hhs.gov/sites/default/files/cb/afcarsreport26.pdf> ("HHS AFCARS Report")
27 (number of youth in foster care or adopted with public child welfare agency involvement during
Fiscal Year 2018).

28 ¹³ *See* Title IV–B and IV–E of the Social Security Act: Data Collection for Foster Care and
Analysis, 58 Fed. Reg. 67,912, 67,913 (Dec. 22, 1993) ("1993 Rule").

- (3) provide comprehensive national information with respect to--
- (A) the demographic characteristics of adoptive and foster children and their biological and adoptive or foster parents,
 - (B) the status of the foster care population (including the number of children in foster care, length of placement, type of placement, availability for adoption, and goals for ending or continuing foster care),
 - (C) the number and characteristics of--
 - (i) children placed in or removed from foster care,
 - (ii) children adopted or with respect to whom adoptions have been terminated, and
 - (iii) children placed in foster care outside the State which has placement and care responsibility,
 - (D) the extent and nature of assistance provided by Federal, State, and local adoption and foster care programs and the characteristics of the children with respect to whom such assistance is provided; and
 - (E) the annual number of children in foster care who are identified as sex trafficking victims--
 - (i) who were such victims before entering foster care; and
 - (ii) who were such victims while in foster care; and
- (4) utilize appropriate requirements and incentives to ensure that the system functions reliably throughout the United States.

Id. § 679(c)(3)-(4).

62. The AFCARS collection must “avoid unnecessary diversion of resources from agencies responsible for adoption and foster care” and “assure that any data that is collected is reliable and consistent over time and among jurisdictions through the use of uniform definitions and methodologies.” *Id.* § 679(c)(1)-(2).

63. ACF also must “disseminate the data and information made available through” AFCARS via the National Adoption Information Clearinghouse, a public database administered by HHS to centralize information related to child welfare, adoption, and foster care. *Id.* § 679a(4). The full AFCARS dataset is available to the public through the National Data Archive on Child Abuse and Neglect. In addition, ACF releases annual AFCARS Reports that provide preliminary

1 snapshots based on the data sent in by the states.

2 64. States and tribes are required to report information to AFCARS as prescribed by
3 ACF's implementing regulations. In return for providing this data and meeting other federal
4 requirements, including the submission of a sufficient state plan for foster care and adoption
5 assistance, *id.* § 671, states and tribes receive title IV–B grants and a significant reimbursement of
6 their title IV–E costs, including 50 percent of expenditures “to plan, design, develop, install, and
7 operate data collection and information retrieval systems” that comply with AFCARS
8 requirements. *Id.* § 674(a)(3)(C), (c).

9 65. Until 2016, AFCARS operated under regulations ACF issued in 1993. *See* 58 Fed.
10 Reg. at 67,912. In devising those 1993 regulations, ACF “was guided by the . . . principles” that
11 the data collection must “produce national information on adoption and foster care, permit
12 meaningful State-specific analyses, permit meaningful comparisons among States, allow for
13 detailed analyses which address critical child welfare policy issues, [and] not unduly burden the
14 Federal government or the States.” *Id.* at 67,915 (punctuation and capitalization altered).

15 66. The 1993 Rule required states to report a number of data elements about foster and
16 adopted youth and their parents, including date of birth, demographic information such as sex and
17 race, the circumstances of a child's removal from a home, the presence of abuse or neglect,
18 previous placements, details of the current placement, adoptive parents, the length of time youth
19 remain in foster care, information about their caretakers, and whether parental rights are
20 terminated. *See id.* at 67,912, 67,926-27. As the agency recognized during the rulemaking,
21 AFCARS serves a number of vital purposes for child welfare programs and ultimately is a
22 “catalyst” for local improvement. *Id.* at 67,915.

23 67. As ACF recognized when it finalized the 1993 AFCARS data requirements (and as
24 Congress recognized when it required dissemination of AFCARS data), AFCARS data provide
25 broad benefits to diverse stakeholders, including to Congress, states, federal agencies, tribes, child
26 welfare advocates, and researchers—and ultimately to youth in care themselves. Comprehensive
27 data would “enable policymakers to assess the reasons why children are in foster care and develop
28 remedies to prevent it” and “be useful for research, the ultimate purpose of which is to gain a

1 better understanding of the foster care program and the causes and other factors contributing to its
2 expansion and other changes; and, eventually, to make suggestions and proposals for change to
3 improve the child welfare system.” *Id.* at 67,912. They also noted that it would “strengthen and
4 preserve family life insofar as the demographic information provided on children in foster care
5 will aid in permanency planning for these children and their families.” *Id.* at 67,923.

6 68. ACF identified a number of purposes for which it would use the data, including
7 “[s]hort and long-term budget projections; trend analyses and short and long-term planning;
8 targeting areas for greater or potential technical assistance efforts, for discretionary service grants,
9 for research and evaluation, and for regulatory change; and background and justification for policy
10 changes and legislative proposals.” *Id.* at 67,912 (punctuation and capitalization altered).

11 69. ACF also explained that it would use the data “to respond to questions and requests
12 from other Departments and agencies, including the General Accounting Office,^[14] the Office of
13 Management and Budget (OMB), the DHHS Office of Inspector General, national advocacy
14 organizations, States and other interested organizations.” *Id.*

15 70. ACF also recognized that, as a congressionally mandated advisory committee had
16 found, “[s]pecial provision needs to be made for Indian children who are affected by requirements
17 in the Indian Child Welfare Act of 1978.” *Id.* at 67,914.

18 71. ACF issued the 1993 Final Rule over “frequent expressions of concern [about] the
19 potential time and cost burdens on the States resulting from the time required to collect and
20 process the data and the possible diversion of resources from services to children; [and] the need
21 for greater Federal support in the costs of the information system.” *Id.* at 67,915. In adopting a
22 semi-annual collection over these objections, ACF relied significantly on the provision of
23 “technical assistance to those States desiring it on the planning, development and implementation
24 of the required system.” *Id.* at 67,916. It further encouraged states to implement technological
25 solutions that could reduce the burden of collection, and promised to “provide guidance in the
26 development of these comprehensive systems.” *Id.* It also anticipated that AFCARS “would allow
27

28 ¹⁴ Now called the Government Accountability Office (“GAO”).

1 and encourage States to manage programs more effectively.” *Id.* at 67,915.

2 **C. The Overrepresentation of and Poor Outcomes for LGBTQ+ and AI/AN**
 3 **Youth in Foster Care**

4 72. Under the 1993 Final Rule, AFCARS did not collect any demographic data on
 5 sexual orientation or gender identity, and provided only race-based information on AI/AN youth,
 6 without distinguishing between youth protected by ICWA and those to whom it did not apply.
 7 Over the next 25 years, however, ACF-funded research and the efforts of tribes, states, and non-
 8 profits revealed that both LGBTQ+ youth and AI/AN youth are overrepresented in the foster care
 9 system compared to their numbers in the general population and suffer disproportionately from a
 10 wide range of negative outcomes, including sex trafficking, abuse and neglect, placement
 11 instability, homelessness, juvenile justice involvement, psychiatric hospitalization, and housing in
 12 group homes and residential treatment facilities.

13 73. Without data on LGBTQ+ youth or the status and treatment of AI/AN youth under
 14 ICWA, AFCARS could not shed any light on the causes and factors contributing to the
 15 disproportionately negative outcomes of LGBTQ+ and AI/AN youth in foster care (or LGBTQ+
 16 AI/AN, in particular), nor could it help ACF or title IV–E agencies determine how to use their
 17 resources to address those problems.

18 **1. *Issues Regarding LGBTQ+ Youth in Foster Care***

19 74. LGBTQ+ youth are disproportionately represented in the child welfare system and
 20 in the population of youth experiencing homelessness. As ACF has acknowledged, studies have
 21 found that, although LGBTQ+ people represent approximately 5 to 10 percent of the general U.S.
 22 population, they account for more than 20 percent of female youth and more than 10 percent of
 23 male youth in the child welfare system.¹⁵ As many as 65 percent of LGBTQ+ youth have lived in

24
 25 ¹⁵ ACF, ACYF-CB-IM-11-03, *Lesbian, Gay, Bisexual, Transgender and Questioning Youth in*
 26 *Foster Care*, 1-2 (2011), <https://www.acf.hhs.gov/sites/default/files/cb/im1103.pdf> (“2011 ACF
 27 *Info. Mem.*”); *see also* UCLA School of Law Williams Institute, *Comment Letter on AFCARS*
 28 *Notice of Proposed Rulemaking* (June 18, 2019), <https://www.regulations.gov/document?D=ACF-2018-0003-0371> (“Williams Inst. NPRM Comment”) (citing studies, including ACF-funded
 research, finding “that there are two times as many LGBTQ youth in foster care as in the general
 population”).

1 a foster or group home, and 39 percent have been forced to leave their home because of adverse
 2 reactions to their sexual orientation or gender identity.¹⁶ And between 20 and 40 percent of youth
 3 who become homeless each year are LGBTQ+.¹⁷

4 75. The treatment of LGBTQ+ youth within the child welfare system and their
 5 outcomes after entering the system are also disproportionately negative. LGBTQ+ youth are more
 6 than twice as likely to report being treated poorly within the child welfare system than their non-
 7 LGBTQ+ peers.¹⁸ LGBTQ+ foster youth suffer higher numbers of total placements while in care,
 8 higher rates of placement in group homes, longer stays in residential care, higher rates of
 9 homelessness, greater rates of hospitalization for emotional reasons, and greater rates of justice
 10 system involvement than their non-LGBTQ+ peers.¹⁹

11 76. The poor safety, permanency, and well-being outcomes for LGBTQ+ youth are
 12 fueled by a lack of services promoting acceptance and support by parents or legal guardians and a
 13 lack of safe and supportive foster and adoptive homes, including LGBTQ+ foster and adoptive
 14 parents, who are more likely to foster, adopt, and provide supportive homes for LGBTQ+ youth.
 15 Many states have historically banned LGBTQ+ parents from adopting or fostering children or
 16 otherwise discriminated against LGBTQ+ foster and adoptive parents. At least 9 states permit
 17 government-funded contract child welfare agencies to refuse to license LGBTQ+ prospective
 18 foster and adoptive parents.

19 77. Given the disproportionate numbers of children of color in the foster care system,
 20 studies show a majority of LGBTQ+ youth in care are youth of color and, thus, also face the same
 21 disparities and poor outcomes that disproportionately impact youth of color generally in the child
 22

23 ¹⁶ 2011 ACF Info. Mem. at 2.

24 ¹⁷ *Id.*

25 ¹⁸ *See, e.g.*, Lambda Legal et al., Comment Letter on AFCARS Notice of Proposed Rulemaking
 26 (June 18, 2019) (“Lambda Legal NPRM Comment”), <https://beta.regulations.gov/document/ACF-2018-0003-0358>.

27 ¹⁹ *Id.*; *see also* Williams Inst. NPRM Comment; Child Welfare League of Am., Comment Letter
 28 on AFCARS Advance Notice of Proposed Rulemaking (June 12, 2018) (“Child Welfare ANPRM
 Comment”), <https://beta.regulations.gov/document/ACF-2018-0003-0109>.

welfare system, including AI/AN children.²⁰ There is no nationwide data, however, regarding numbers or experiences of LGBTQ+ youth of color in foster care.

2. *Issues Regarding American Indian and Alaska Native Youth in Foster Care*

78. AI/AN youth have been vastly overrepresented in the child welfare system for decades. During the 1970s, a Congressional inquiry found that approximately 25 to 35 percent of all AI/AN youth had been removed from their homes and placed into non-tribal homes.²¹ Out-of-home placements, especially non-family or non-tribal placements, are associated with adverse impacts on the health and well-being of those children.²²

79. For example, AI/AN youth adopted by non-tribal families are more likely to report mental health problems than their white counterparts, including alcohol addiction, alcohol recovery, drug recovery, eating disorders, self-harm, and suicidal ideation.²³ Removing AI/AN children to non-tribal placements on a large scale has also had devastating consequences for tribal communities, causing intergenerational and historical trauma that “shattered [the] social fabric and homelands of Indigenous populations”²⁴

80. To combat the harms caused by the “alarmingly high percentage of Indian families . . . broken up by the removal . . . of their children,” 25 U.S.C. § 1901(4), Congress enacted ICWA. In doing so, Congress recognized that children are a vital resource “to the continued existence and integrity of Indian tribes” and declared that it was national policy to “protect the best interests of Indian children and to promote the stability and security of Indian tribes and families.”

²⁰ See Equality N.C. and N.C. Child, Comment Letter on AFCARS Advance Notice of Proposed Rulemaking (June 12, 2018), <https://beta.regulations.gov/document/ACF-2018-0003-0116> (“Equality N.C. ANPRM Comment”).

²¹ See H.R. Rep. No. 95-1386, at 9 (1978), *as reprinted in* 1978 U.S.C.A.N. 7530, 7531.

²² See generally, e.g., Attorney Gen.’s Advisory Comm. on Am. Indian/Alaska Native Child. Exposed to Violence, *Ending Violence so Children Can Thrive* 38-39 (2014) (“AG Report”), https://www.justice.gov/sites/default/files/defendingchildhood/pages/attachments/2015/03/23/ending_violence_so_children_can_thrive.pdf.

²³ See, e.g., *id.* at 94 (discussing adverse childhood experiences and outcomes).

²⁴ *Id.* at 40.

1 *Id.* §§ 1901(3), 1902.

2 81. ICWA implements this policy through a variety of provisions intended to keep
3 AI/AN youth in their communities, including minimum federal standards for the removal of
4 AI/AN children from their families.

5 82. For example, in any child custody proceeding—*e.g.*, proceedings regarding foster
6 care, the termination of parental rights, pre-adoptive placements, and adoptive placements, *id.* §
7 1903(1)—involving an “Indian Child,”²⁵ ICWA provides that the child’s tribe has a right to
8 intervene, *id.* § 1911(c).

9 83. Similarly, ICWA contains several provisions intended to prevent unwarranted
10 removals of AI/AN youth from their families, including:

- 11 a. a requirement that parties who initiate proceedings to terminate parental rights or to
12 put an AI/AN child in foster care must notify a child’s tribe and parents, *id.* §
13 1912(a);
- 14 b. a provision establishing the right of parents to court-appointed counsel in any such
15 proceeding if the court determines indigency, *id.* § 1912(b);
- 16 c. a requirement that parties seeking to terminate parental rights or to make a foster
17 care placement demonstrate to the court that they have made active efforts without
18 success to prevent the breakup of the Indian family (*e.g.*, through remedial services
19 or rehabilitative programs), *id.* § 1912(d); and
- 20 d. a requirement that such parties demonstrate, based on heightened burdens of proof
21 (including testimony of a qualified expert witness), that the continued custody of
22 the child by the parent or Indian custodian is likely to result in serious physical or
23 emotional damage to the child, *id.* § 1912(e)-(f).

24
25 ²⁵ ICWA defines an Indian child as “any unmarried person who is under age eighteen and is either
26 (a) a member of an Indian tribe or (b) is eligible for membership in an Indian tribe and is the
27 biological child of a member of an Indian tribe.” 25 U.S.C. § 1903(4). This definition reflects the
28 unique political status of Indian people, whose rights and status are tied to their membership of a
federally recognized tribe, rather than race or place of birth. *See Morton v. Mancari*, 417 U.S. 535
(1974).

1 84. ICWA also permits parents and Indian tribes to petition for a child custody
2 proceeding to be transferred to tribal court jurisdiction. *Id.* § 1911(b).

3 85. In those cases where foster care or adoption is ordered, ICWA mandates that child
4 welfare agencies comply with placement preferences that prioritize placing children with extended
5 family members and/or within their tribal community. *Id.* § 1915.

6 86. These provisions are intended to afford protections for the approximately two
7 million AI/AN children²⁶ who are members of, or are the biological child of a member of and are
8 eligible for membership in, one of the 576 federally recognized Indian tribes in the United States.

9 87. Because of the protections ICWA provides to AI/AN children, families, and
10 communities, ICWA's requirements are broadly considered the "gold standard" for child
11 welfare.²⁷

12 88. Nevertheless, due in significant part to state child welfare agencies' failures to meet
13 ICWA's requirements and the lack of data from which those failures can be pinpointed, states
14 have not achieved Congress's goals in passing ICWA. AI/AN youth continue to be
15 overrepresented in the child welfare system at a rate twice that of their representation in the
16 population, accounting for 2 percent of all children in foster care in 2018²⁸ despite accounting for
17 approximately 1 percent of all youth in the United States during that same time period.²⁹ In some
18 states, AI/AN youth are the largest, most disproportionately represented group. For example, a
19 2005 GAO study found that approximately 62% of all youth in foster care in Alaska were AI/AN
20
21
22

23 ²⁶ U.S. Census Bureau, Annual Estimates of the Resident Population by Sex, Age, Race Alone or
24 in Combination, and Hispanic Origin for the United States: April 1, 2010 to July 1, 2019,
[https://www2.census.gov/programs-surveys/popest/tables/2010-2019/national/asrh/nc-est2019-
asr5h.xlsx](https://www2.census.gov/programs-surveys/popest/tables/2010-2019/national/asrh/nc-est2019-asr5h.xlsx).

25 ²⁷ *See, e.g.*, Cal. Tribal Families Coal., Comment Letter on AFCARS Notice of Proposed
26 Rulemaking (June 17, 2019), <https://beta.regulations.gov/document/ACF-2018-0003-0297>.

27 ²⁸ HHS AFCARS Report at 2.

28 ²⁹ Tina Norris et al., *The American Indian and Alaska Native Population: 2010*, U.S. Census
Bureau, 3 (2012), <https://www.census.gov/history/pdf/c2010br-10.pdf>.

1 youth.³⁰

2 89. ACF has recognized that ICWA's inability to remedy these disproportionalities is
 3 the result of inconsistent and flawed implementation of ICWA's requirements. For example, ACF
 4 has acknowledged, as detailed further below, that state child welfare agencies and state courts
 5 have failed to implement ICWA's requirements and that there has generally been confusion
 6 regarding when and how to apply the law.³¹ Similarly, a taskforce convened by the California
 7 Attorney General found that, nearly four decades after ICWA's passage, "the promise and
 8 potential of the federal ICWA . . . [has] not been fully realized, as neither the letter nor the spirit of
 9 the law has been fully implemented."³²

10 90. This problem is exacerbated by the fact that there is no national dataset that tracks
 11 the implementation of ICWA and the outcomes for children in ICWA cases. Policymakers and
 12 stakeholders—including tribes, foster youth, and families—have struggled to identify effective
 13 solutions in part because they lack the data necessary to understand the precise nature and extent
 14 of the flaws in ICWA's implementation. For example, without data collection from ICWA cases,
 15 stakeholders are unable to know whether state courts and child welfare agencies are implementing
 16 specific ICWA requirements.³³ They are also unable to understand the disproportionalities that
 17 still exist for AI/AN youth in foster care,³⁴ or whether the systems serving AI/AN youth are
 18 working.³⁵ Tribal agencies are further hampered by the fact that AFCARS neither distinguishes

19 _____
 20 ³⁰ GAO, GAO-05-290, Indian Child Welfare Act: Existing Information on Implementation Issues
 21 Could Be Used to Target Guidance and Assistance to States 13 (2005),
<https://www.gao.gov/assets/250/245936.pdf>.

22 ³¹ Adoption and Foster Care Analysis and Reporting System, 81 Fed. Reg. 20,283, 20,284
 (proposed Apr. 7, 2016) ("2016 SNPRM").

23 ³² Task Force Report at v.

24 ³³ See, e.g., Casey Fam. Programs, Comment Letter on AFCARS Notice of Proposed Rulemaking
 (June 17, 2019), <https://beta.regulations.gov/document/ACF-2018-0003-0312>.

25 ³⁴ See, e.g., Cherokee Nation, Comment Letter on AFCARS Advance Notice of Proposed
 26 Rulemaking (June 12, 2018) ("Cherokee Nation ANPRM Comment"),
<https://beta.regulations.gov/document/ACF-2018-0003-0136> ("In order to fully appreciate this
 27 disproportionality we must have better data relating to Indian children in state systems.").

28 ³⁵ See, e.g., Juv. L. Ctr., Comment Letter on AFCARS Notice of Proposed Rulemaking (June 18,

1 between children who identify as AI/AN and those who meet the definition of “Indian child”
 2 under ICWA, nor provides data on AI/AN children by tribe.

3 91. The federal government has explicitly recognized these problems and the need for
 4 further data. For example, after reporting on the lack of funding for tribal social services systems,
 5 disproportionality high rates for AI/AN children in state foster care systems, the overexposure of
 6 AI/AN children to violence, and a lack of ICWA compliance in state agencies and courts, the
 7 United States Attorney General’s Advisory Committee on American Indian and Alaska Native
 8 Children Exposed to Violence recommended that ACF collaborate with tribes and the Bureau of
 9 Indian Affairs to collect “data on all AI/AN children who are placed into foster care . . . to allow
 10 tribes and the BIA to make informed decisions regarding AI/AN children.”³⁶ It specifically called
 11 out the need to collect “data regarding compliance with ICWA.”³⁷

12 **D. The Decade-Long Effort Producing the 2016 Revisions to AFCARS**

13 92. HHS and ACF have long recognized that the limited data collected under the 1993
 14 Rule was insufficient.

15 93. In 2003, GAO and the HHS Office of the Inspector General (“OIG”) both
 16 published reports discussing the limitations of existing AFCARS data.³⁸ Among other findings,
 17 the OIG concluded the data elements in AFCARS may not capture all relevant information and
 18 may produce inaccurate results. For example, the limited response categories for AFCARS data
 19 could result in youth placed with family members being mistakenly reported as placed with a
 20 “Married Couple.” 2003 OIG Report at 6. States also interpreted data fields differently, resulting
 21 in inconsistent data. *See, e.g., id.* at 8-9. Around this time, Congress also passed the Adoption
 22

23 2019), <https://beta.regulations.gov/document/ACF-2018-0003-0345>.

24 ³⁶ AG Report at 76.

25 ³⁷ *Id.* at 77.

26 ³⁸ *See* GAO, GAO-04-267T, Child Welfare: States Face Challenges in Developing Information
 27 Systems and Reporting Reliable Child Welfare Data (2003), (“2003 GAO Report”),
 28 <https://www.gao.gov/assets/120/110511.pdf>; HHS OIG, OEI-07-01-00660, Adoption and Foster
 Care Analysis and Reporting System (AFCARS): Challenges and Limitations (2003) (“2003 OIG
 Report”), <https://oig.hhs.gov/oei/reports/oei-07-01-00660.pdf>.

1 Promotion Act of 2003, Pub. L. No. 108–145, 117 Stat. 1879, which necessitated changes to
2 AFCARS.

3 94. ACF responded to these developments by requesting public comment on potential
4 improvements to AFCARS.³⁹ Based on the comments it received, ACF issued a notice of
5 proposed rulemaking in 2008 that would have expanded AFCARS data elements to support more
6 longitudinal data analysis.⁴⁰

7 95. Shortly after this proposal, Congress passed the Fostering Connections to Success
8 and Increasing Adoptions Act of 2008, Pub. L. No. 110-351, 122 Stat. 3949, which amended title
9 IV in ways that necessitated further changes to the data collection. ACF thereafter issued a request
10 for information seeking additional public comment in 2010.⁴¹

11 96. Before ACF could finalize a proposed rule, Congress amended title IV again in
12 2014, requiring AFCARS reporting to document “the annual number of children in foster care
13 who are identified as sex trafficking victims” before or since entering foster care. 42 U.S.C. §
14 679(c)(3)(E).

15 97. During this same time period, after extensive research, reports from focus groups
16 with foster youth, and professional standards issued by the Child Welfare League of America and
17 others, ACF published a 2011 Information Memorandum entitled “Lesbian, Gay, Bisexual,
18 Transgender and Questioning Youth in Foster Care.” The memorandum recognized that
19 “[LGBTQ] youth are often overrepresented in the population of youth served by the child welfare
20 system and in the population of youth living on the streets”; have negative experiences in care,
21 including a “heightened concern” for their physical safety; and “often cycle through foster homes,
22 group homes, and the streets.”⁴² ACF also recognized that “LGBT foster and adoptive parents can
23

24 ³⁹ Request for Public Comment on the Improvement of the Adoption and Foster Care Analysis and
25 Reporting System (AFCARS), 68 Fed. Reg. 22,386 (Apr. 28, 2003).

26 ⁴⁰ Adoption and Foster Care Analysis and Reporting System, 73 Fed. Reg. 2,082 (proposed Jan.
11, 2008).

27 ⁴¹ Request for Public Comment and Consultation Meetings on the Adoption and Foster Care
Analysis and Reporting System (AFCARS), 75 Fed. Reg. 43,187 (July 23, 2010).

28 ⁴² 2011 ACF Info. Mem. at 1-3.

1 provide a loving, stable home, responsive to the needs of LGBTQ youth in care, and are a largely
 2 untapped resource—an estimated 2 million LGB individuals are interested in adopting.”⁴³

3 98. Additionally, ACF published a notice of proposed rulemaking in August 2015 to
 4 require states to update their child welfare databases to match a new federal standard called
 5 Comprehensive Child Welfare Information Systems (“CCWIS”) in order to receive federal
 6 funding.⁴⁴ ACF subsequently finalized the CCWIS rule in June 2016, requiring states to update
 7 their data collection systems and use case management data systems that allowed for some
 8 flexibility in reporting.⁴⁵

9 99. Thus, by 2015, revisions to AFCARS’ implementing regulations were long
 10 overdue. Since the 1993 iteration of the regulations, Congress had passed three laws amending the
 11 child welfare system, GAO and OIG had issued reports documenting the limitations of the current
 12 AFCARS system, and ACF had received multiple rounds of public comment. Many states,
 13 moreover, were embarking on an ACF-supported effort to modernize their child welfare databases,
 14 a project that made it a particularly efficient time to add data elements to those databases.

15 1. 2015 NPRM

16 100. After this decade-plus of inquiry and legal developments, ACF issued a new notice
 17 of proposed rulemaking in February 2015.⁴⁶ The 2015 NPRM “buil[t] on” the 2008 NPRM,
 18 proposing “many of the same changes,” 80 Fed. Reg. at 7132. It also included data elements
 19 needed to implement the recent congressional enactments. *Id.*

20 101. Among other subjects, the 2015 NPRM proposed to add questions regarding health
 21 assessments; health, behavioral, and mental health conditions; school enrollment; educational
 22 stability; transition planning; sex trafficking; and several other topics. *Id.* at 7148-54. It also

24 ⁴³ *Id.* at 3 (citation omitted).

25 ⁴⁴ Comprehensive Child Welfare Information System, 80 Fed. Reg. 48,200 (proposed Aug. 11, 2015).

26 ⁴⁵ Comprehensive Child Welfare Information System, 81 Fed. Reg. 35,450 (June 2, 2016)
 27 (codified at 45 C.F.R. §§ 1355-1356).

28 ⁴⁶ Adoption and Foster Care Analysis and Reporting System, 80 Fed. Reg. 7132 (proposed Feb. 9, 2015) (“2015 NPRM”).

1 omitted some data elements proposed in the 2008 NPRM due to concerns raised by state agencies
2 and other interested parties. *Id.* at 7138-39.

3 102. The 2015 NPRM also recognized the ample research showing that “LGBTQ youth
4 are often overrepresented in the population of youth served by the child welfare system and in the
5 population of youth living on the streets, however there is little or no data on the experiences of
6 these youth.” *Id.* at 7155. To determine whether and how “to collect information on LGBTQ youth
7 in AFCARS in light of these practical issues and strategies for identifying LGBTQ youth in the
8 AFCARS reporting population in a manner that permits case-level data analysis between existing
9 federal data collection efforts,” ACF

10 invite[d] comments on the issues of whether we should collect data relating to
11 LGBTQ statuses; what, if any, data should be collected relating to these statuses;
12 what the utility of such data collection might be; what issues would arise if there
13 were inconsistent approaches between AFCARS and [the National Youth in
Transition Database]; and how to best address such inconsistencies if a decision is
made for expanded data collection relating to LGBTQ statuses.

14 *Id.*

15 103. ACF emphasized the unique advantages of collecting data on demographics and the
16 experiences of foster and adoptive youth through AFCARS. As it explained, “[o]ther existing data
17 sets cannot yield similar information because AFCARS is the only national, comprehensive case-
18 level data set on the incidence and experiences of children who are in foster care and/or achieve
19 adoption or guardianship with the involvement of the State or Tribal title IV–E agency.” *Id.* at
20 7133.

21 104. ACF also considered the burden of the expanded collection on state and tribal title
22 IV–E agencies. It estimated that child welfare agencies would incur a combined \$24 million
23 annually for the first five years, fully half of which would be reimbursed by the Federal
24 government under title IV–E. *Id.* at 7133, 7202. ACF spelled out the assumptions underlying its
25 burden analysis and noted that they “may be an overestimate.” *Id.* at 7203-04.

26 2. 2016 SNPRM

27 105. Both the 2008 and 2015 NPRMs, along with the required tribal consultations ACF
28 undertook, prompted comments requesting that ACF include additional data elements mirroring

1 ICWA requirements.

2 106. In April 2015, ACF issued a notice of its intent to publish a supplemental notice of
3 proposed rulemaking, explaining that it had concluded that ACF was authorized to collect ICWA-
4 related data because the Social Security Act “permits broader data collection in order to assess the
5 current state of adoption and foster care programs in general, as well as to develop future national
6 policies concerning those programs.”⁴⁷

7 107. ACF issued a supplemental notice of proposed rulemaking in April 2016,
8 proposing to include data elements corresponding with ICWA requirements for state title IV–E
9 agencies.⁴⁸ As ACF explained, “[a]lthough ICWA was passed more than 30 years ago, it is unclear
10 how well state agencies and courts have implemented ICWA’s requirements into practice” and
11 there was “confusion regarding how and when to apply the law” even in “states with large AI/AN
12 populations.” 81 Fed. Reg. at 20,284. This confusion was “complicated by the fact that there is no
13 comprehensive national data on the status of AI/AN children for whom ICWA applies at any stage
14 in the adoption or foster care system.” *Id.*

15 108. ACF found that “AFCARS data can bridge this gap.” *Id.* Specifically, collecting
16 ICWA data would serve “several uses in the public interest including: To assess the current state
17 of foster care and adoption of Indian children under the Act, to develop future national policies
18 concerning ACF programs that affect Indian children under the Act, and to meet federal trust
19 obligations under established federal policies.” *Id.*; *see also id.* at 20,284–86 (identifying
20 additional ways ACF will use the data). These uses reflected “Department-wide priorities to
21 affirmatively protect the best interests of Indian children and to promote the stability and security
22 of Indian tribes, families, and children.” *Id.* at 20,284. They further implemented the Social
23 Security Act because they “will improve the AFCARS data collection system to provide more
24 comprehensive demographic and case-specific information on all children, including children
25

26 ⁴⁷ Adoption and Foster Care Analysis and Reporting System, 80 Fed. Reg. 17,713, 17,713 (Apr. 2,
27 2015).

28 ⁴⁸ Adoption and Foster Care Analysis and Reporting System, 81 Fed. Reg. 20,283 (Apr. 7, 2016)
 (“2016 SNPRM”).

1 subject to ICWA.” *Id.*; *see also id.* at 20,288 (“Such elements will help establish demographics
2 necessary in identifying ICWA cases that involve parents who are tribal members or that involve
3 an Indian custodian. . . . More accurate data will help ACF better understand the scope of ICWA’s
4 impact in AI/AN child foster care cases and state systems, help identify where the application of
5 ICWA may need reinforcement, and help inform ACF technical assistance to state title IV–E
6 agencies.”).

7 109. Accordingly, ACF proposed to include a series of data elements to collect
8 information on how the agency implemented ICWA in a child’s case. These data elements
9 “represent the minimum that a state title IV–E agency should be collecting to determine whether
10 the child is an Indian child under ICWA.” *Id.* at 20,288. States would need to complete the full set
11 of ICWA data elements only for the roughly 2 percent of youth to whom ICWA applies. *Id.* at
12 20,297. For all other youth—nearly 98 percent of the children about whom states reported—states
13 would need to supply only three data elements addressing whether they knew or had reason to
14 know that the child is an Indian child as defined by ICWA. *Id.* at 20,297, 20,300. Thus, the ICWA
15 questions would impose little burden on child welfare agencies in the vast majority of cases—just
16 half an hour per non-ICWA child, compared to 10 hours per child covered by ICWA. *Id.* at
17 20,298.

18 110. ACF detailed the need for and benefit of each element that it proposed to include.
19 *Id.* at 20,288-91. It also explained how it tailored the proposed data elements to comply with the
20 Social Security Act’s requirement that data collection avoid unnecessarily diverting resources
21 from agencies responsible for adoption and foster care. *Id.* at 20,286. It similarly identified
22 alternatives that it had considered and rejected, specifically noting that “including too few data
23 elements . . . may exclude Indian children and families from the additional benefit of improving
24 AFCARS data.” *Id.* at 20,295-96.

25 111. Considering comments it received from title IV–E agencies, ACF estimated that the
26 one-time costs of modifying systems and training personnel would be approximately \$6.5 million,
27 while the annual cost would be approximately under \$15 million. *Id.* at 20,298. ACF noted that
28 these estimates likely overstated the burden on title IV–E agencies, because “[a]s more states build

1 [CCWIS], ACF anticipates it will lead to more efficiency in reporting and less cost and burden to
 2 the state agencies.” *Id.* at 20,297.⁴⁹

3 3. 2016 Final Rule

4 112. In response to the 2015 NPRM and 2016 SNPRM, ACF received 217 comments
 5 from “states, Indian tribes and organizations representing tribal interests, national advocacy/
 6 public interest groups, universities, and private citizens.”⁵⁰

7 113. After considering these comments, ACF issued a 74-page Final Rule adopting
 8 many of the data elements proposed in the 2015 NPRM and 2016 SNPRM, but “remov[ing] some
 9 data elements in response to comments . . . and modif[ying] others.” 81 Fed. Reg. at 90,524.

10 114. ACF began the 2016 Final Rule by reiterating its mandate under the Social Security
 11 Act to maintain “a data collection system which provides comprehensive national information on:
 12 the demographic characteristics of adopted and foster children and their parents; the status and
 13 characteristics of the foster care population;” and other information. *Id.* at 90,525. It then
 14 explained the many different purposes for which ACF uses AFCARS data, including:

- 15 • Draw[ing] national statistics and trends about the foster care and adoption populations
 16 for assessing the current state of foster care and adoption.
- 17 • Complet[ing] the annual Child Welfare Outcomes Report to Congress (section 479A of
 18 the Act).
- 19 • Develop[ing] our budgets.
- 20 • Calculat[ing] payments for the Adoption and Guardianship Incentive Payments
 21 program.
- 22 • Monitor[ing] title IV–E agency compliance with title IV–B and IV–E requirements,
 23 including drawing the population sample for title IV–E reviews.
- 24 • Develop[ing] appropriate national policies with respect to adoption and foster care; and
- 25 • Address[ing] the unique needs of Indian children as defined by ICWA in foster care or
 who exit to adoption, and their families.

26 ⁴⁹ ACF referred to the Statewide Automated Child Welfare Information System (“SACWIS”), the
 27 predecessor to CCWIS.

28 ⁵⁰ Adoption and Foster Care Analysis and Reporting System, 81 Fed. Reg. 90,524, 90,525 (Dec.
 14, 2016) (“2016 Final Rule”).

1 *Id.*

2 115. ACF explained the many benefits it believed the 2016 Final Rule would provide,
3 including “more comprehensive information to deepen [its] understanding of guardianships and to
4 address the unique needs of Indian children as defined in ICWA” and “further [its] work to draw
5 national statistics and trends about the foster care, adoption, and guardianship populations for
6 assessing the current state of these federal programs and inform national policies with respect to
7 adoption, guardianship, and foster care.” *Id.* at 90,525.

8 116. The Final Rule included data elements on most of the topics addressed in the 2015
9 NPRM and 2016 SNPRM, including health assessments; health, behavioral, and mental health
10 conditions; school enrollment; educational stability; transition planning; sexual orientation;
11 ICWA; and sex trafficking. *See id.* at 90,539-41, 90,550, 90,552-56. In various places, it deleted,
12 modified, or clarified the required data elements in response to comments from title IV–E agencies
13 and others. For example, in response to comments from state title IV–E agencies, ACF deleted
14 data elements regarding whether children were born in the United States and whether they had
15 qualifying disabilities under the Individuals with Disabilities in Education Act. *Id.* at 90,534.

16 117. As most relevant to this case, the Final Rule included demographic questions
17 regarding sexual orientation and questions about the status and characteristics of, and the extent of
18 assistance and procedural protections provided to, children protected by ICWA.

19 118. Regarding sexual orientation, ACF was “persuaded” by commenters that showed
20 that LGBTQ+ youth “are overrepresented in the child welfare system, but we do not have a full
21 picture of their experiences in foster care,” and that “such youth often have unique service needs,
22 are at an increased risk for poor outcomes, are more likely to be placed in group settings and
23 experience more placements.” *Id.*

24 119. Accordingly, the Final Rule incorporated a data element requiring title IV–E
25 agencies to report the child’s voluntarily self-reported sexual orientation for youth age 14 and
26 older. *Id.*

27 120. ACF explained that it included this demographic question

28 to move closer toward our goal to better support children and youth in foster care

1 who identify as LGBTQ and ensure that foster care placement resources and
2 services are designed appropriately to meet their needs. We are aware of situations
3 where youth in foster care have been unsupported in their foster care placements
when their foster caregivers became aware of their sexual orientation.

4 *Id.* at 90,534-35. It also noted that the data would “assist title IV– E agencies in recruiting and
5 training foster care providers in meeting the needs of these youth.” *Id.* at 90,535; *see also id.* at
6 90,526 (“Our goal in including this information is that the data will assist title IV–E agencies to
7 help meet the needs of LGBTQ youth in foster care.”).

8 121. ACF rejected commenters’ requests to include additional data elements asking
9 about gender identity or gender expression, or to include additional response options. Instead, it
10 chose to make the sexual orientation response options identical to data routinely gathered on
11 sexual orientation through the Youth Risk Behavior Surveillance System questionnaire from the
12 Centers for Disease Control and Prevention (“CDC”). *Id.* at 90,534.

13 122. ACF acknowledged that some title IV–E agencies, while “express[ing] appreciation
14 for ACF’s interest in supporting and protecting LGBTQ+ youth in foster care and agree[ing] that it
15 is important to work toward a mechanism for collecting information related to a youth’s sexual
16 orientation, gender identity and expression,” opposed the sexual orientation question because the
17 self-reported nature of the question “could result in an undercount of LGBTQ children in foster
18 care;” because sexual orientation is sensitive and private; and because collecting the data could
19 pose safety concerns due to the discrimination that LGBTQ+ individuals still face in many parts of
20 the country. *Id.*

21 123. ACF considered but rejected these concerns, both because response was voluntary
22 and therefore youth who did not feel comfortable disclosing their sexual orientation could decline
23 to share it, and because all child welfare databases are subject to confidentiality requirements. *Id.*
24 at 90,535. Recognizing the sensitivity of the question, ACF explained that “[s]everal state and
25 county agencies, advocacy organizations and human rights organizations have developed guidance
26 and recommended practices” for addressing sexual orientation in adoption, foster care, and out-of-
27 home placement settings. *Id.* at 90,526. It identified resources to guide title IV–E agencies in
28 asking such questions. *Id.*

1 124. Additionally, the Final Rule included a demographic question asking about the
 2 sexual orientation of foster parents, adoptive parents, and legal guardians, as well as a data
 3 element recording whether there was family conflict related to the child’s sexual orientation,
 4 gender identity, or gender expression at removal, reflecting findings in ACF’s 2011 LGBTQ
 5 Information Memorandum. *See id.* at 90,526, 90,554, 90,558-59.

6 125. The Final Rule also included a series of ICWA-related data elements, which were
 7 drafted to reflect the requirements in recently issued Bureau of Indian Affairs regulations
 8 implementing ICWA. *Id.* at 90,536. As in the 2016 SNPRM, these included three data elements
 9 designed to assess whether ICWA applies, followed by a set of data elements that only needed to
 10 be answered for the roughly 2 percent of children to whom ICWA applies. *See id.* at 90,570.

11 126. In response to comments, the Final Rule explained why each element was
 12 necessary. *See id.* at 90,535-39, 90,545-48, 90,552-53, 90,556, 90,560-61. For example, ACF
 13 explained that it included a data element identifying the availability of ICWA-specific placement
 14 options because it was “essential for ACF to determine whether resources are needed for
 15 recruitment to increase the availability of AI/AN homes that can meet ICWA’s placement
 16 preferences.” *Id.* at 90,552.

17 127. Similarly, ACF explained that it was including a set of yes/no data elements about
 18 the basis for court orders for foster care placement because they would

19 provide data on the extent to which Indian children as defined in ICWA are
 20 removed in a manner that conforms to ICWA’s standards, inform[] ACF about the
 21 frequency of and evidentiary standards applied to removals of Indian children,
 22 help[] identify needs for training and technical assistance related to ICWA, and
 23 highlight[] substantive opportunities for building and improving relationships
 24 between states and tribes. Removing [the question] . . . would diminish our ability
 25 to achieve these purposes.

26 *Id.* at 90,548.

27 128. ACF included only data elements recording child welfare practices “required under
 28 the ICWA,” and rejected suggestions for questions that addressed data not required by ICWA. *Id.*
 at 90,547. ACF explicitly determined *not* to add some questions proposed by commenters who
 sought to expand the ICWA elements further, explaining that it chose not to include them

1 “because we must balance the need to have the information with the burden and cost it places on
2 state agencies to do so.” *Id.* at 90,536; *see also, e.g., id.* at 90,547.

3 129. ACF also conducted a cost and burden analysis, concluding that title IV–E agencies
4 would incur aggregate annual costs of approximately \$81 million, half of which would be
5 reimbursed by the federal government. *Id.* at 90,567. ACF noted that these costs would likely
6 decline “[a]s more title IV–E agencies build CCWIS.” *Id.* It had also noted previously that title
7 IV–E agencies may be able to obtain further reimbursement because “enhancements in the title
8 IV–E agency’s case management system to support new data collection requirements may be
9 eligible for [CCWIS] development funding.” 80 Fed. Reg. at 7136.

10 130. ACF explained the main alternatives that it considered and why it rejected each
11 one. 81 Fed. Reg. at 90,565. Most notably, it noted that no other data set could yield similar
12 information, because “AFCARS is the only comprehensive case-level data set on the incidence
13 and experiences of children who are in out-of-home care under the placement and care of the title
14 IV–E agency or who are adopted under a title IV–E adoption assistance agreement.” *Id.*

15 131. Finally, ACF delayed implementation of the new reporting requirements until
16 October 1, 2019, giving title IV–E agencies two fiscal years to prepare to implement the required
17 changes. *Id.* at 90,529. Many title IV–E agencies had commented that they would need “more time
18 than one year” to prepare. *Id.* Just two states had indicated that they would need two to three years.
19 *Id.*

20 **E. Defendants’ Efforts to Prevent the 2016 Final Rule from Taking Effect**

21 132. Beginning with the change in administrations in January 2017, ACF ceased all
22 apparent efforts to help states prepare to comply with the 2016 Final Rule, and instead began
23 working to prevent it from ever taking effect.

24 133. In issuing the 2016 Final Rule, ACF stated repeatedly that it would “provide
25 technical assistance” to title IV–E agencies to prepare to meet their new obligations. *See, e.g., id.*
26 at 90,526, 90,531–33, 90,535, 90,537, 90,539–43, 90,551–52, 90,554, 90,559. Title IV–E agencies
27 had long expressed their need for technical assistance in complying with any new requirements.
28 *See, e.g.,* 80 Fed. Reg. at 7136.

1 134. Despite ACF's stated commitment to assisting states, ACF never revised the
2 Technical Bulletins it provides to "assist title IV-E agencies in developing, implementing, and
3 maintaining their AFCAR system."⁵¹ Nor, on information and belief, did it provide other technical
4 assistance to title IV-E agencies to prepare them to comply with the new requirements.

5 135. Instead of assisting title IV-E agencies to comply, ACF began laying the
6 groundwork to gut the 2016 Final Rule.

7 136. At least as early as the spring of 2017, ACF personnel began informing tribes that
8 the regulation was under review. Tribes asked to discuss the AFCARS regulations with ACF's
9 Deregulation Task Force, but were rebuffed by ACF Acting Assistant Secretary Steven Wagner.

10 137. Fifteen months after issuing the 2016 Final Rule, on March 15, 2018, ACF issued a
11 notice of proposed rulemaking stating its intent to delay the compliance deadline by an additional
12 two years.⁵² This would give title IV-E agencies four years from the 2016 Final Rule's issuance to
13 come into compliance, even though no agency had requested that amount of time, and the longest
14 amount anyone requested—up to three years—was sought by only two agencies. *See* 81 Fed. Reg.
15 at 90,529.

16 138. This notice of proposed rulemaking made clear that ACF intended to revisit the
17 conclusions it had reached 15 months earlier, giving newfound deference to burden objections that
18 it had rejected after evaluating them at length in the 2016 Final Rule. *See* 83 Fed. Reg. at 11,451.

19 139. After a 30-day comment period, ACF issued a final rule delaying compliance dates
20 by a year.⁵³ ACF acknowledged that the majority of the 43 comments it received—all but those
21 from 12 states and one organization—opposed the delay. 83 Fed. Reg. at 42,225-26. And it
22 recognized both the importance of the information to be reported to AFCARS and that the 2016
23

24 ⁵¹ Children's Bureau, AFCARS Technical Bulletins, [https://www.acf.hhs.gov/cb/laws-](https://www.acf.hhs.gov/cb/laws-policies/technical-bulletins/afcars)
25 [policies/technical-bulletins/afcars](https://www.acf.hhs.gov/cb/laws-policies/technical-bulletins/afcars). As of the date of this filing, the links to the individual
Technical Bulletins on this website all state that they were published in 2012.

26 ⁵² Adoption and Foster Care Analysis and Reporting System, 83 Fed. Reg. 11,450 (proposed Mar.
27 15, 2018).

28 ⁵³ Adoption and Foster Care Analysis and Reporting System, 83 Fed. Reg. 42,225 (Aug. 21,
2018).

1 Final Rule was the first update to the AFCARS regulations since 1993. *Id.* at 42,226.
 2 Nevertheless, with just one sentence of explanation, it dismissed the majority of comments out of
 3 hand. *See id.* (“We must balance the need for updated data with the needs of our grantees, the title
 4 IV–E agencies, that must revise their systems to meet new AFCARS requirements and will
 5 ultimately be held accountable via compliance and penalties to report the data.”).

6 140. Without any analysis of the effect on youth in foster care, families, tribes, or other
 7 interested parties, ACF delayed implementation by one year to October 1, 2020. *Id.* This gave
 8 states three years to come into compliance—again, longer than all but two states had requested
 9 during the rulemaking that led to the 2016 Final Rule.

10 141. On information and belief, ACF continued its practice of not providing technical
 11 assistance to title IV–E agencies that were preparing to comply with this extended deadline, even
 12 though states that commented in favor of the delay did so in the hope that the extra time would
 13 “allow[] ACF time to provide needed technical assistance and guidance on the new AFCARS
 14 requirements.” *Id.* Instead of assisting compliance with the existing requirements, ACF turned to
 15 rescinding significant portions of the 2016 Final Rule.

16 **F. Defendants’ Decision to Gut the 2016 Final Rule**

17 *1. 2018 ANPRM and 2019 NPRM*

18 142. Concurrent with its proposal to delay the 2016 Final Rule, ACF issued an advanced
 19 notice of proposed rulemaking seeking comments on the “burden” associated with the data
 20 elements included in the 2016 Final Rule.⁵⁴ The 2018 ANPRM assumed that some data elements
 21 were “overly burdensome” and requested that commenters identify those elements and “provide a
 22 rationale” for why that was so. 83 Fed. Reg. at 11,450. It invited comments as to how the data
 23 elements could be “simplif[ied]” and which data elements “would not be reliable or [are] not
 24 necessary.” *Id.* It tellingly did not invite input on the benefits of the 2016 Final Rule as a whole or
 25 individual data elements, except to the limited extent that they “are important to understanding and
 26 assessing the foster care population at the national level,” *id.*, just one of the many purposes of

27 ⁵⁴ Adoption and Foster Care Analysis and Reporting System, 83 Fed. Reg. 11,449 (proposed Mar.
 28 15, 2018) (“2018 ANPRM”).

1 AFCARS that ACF had recognized in both the 1993 and 2016 Rules. *See supra* ¶¶ 66-70, 114.

2 143. In response, ACF “received 237 comments from 38 states, 38 Indian tribes or
3 consortiums, 62 organizations representing state or tribal interests, national public advocacy
4 groups, professional associations, universities, two members of Congress, and 97 private
5 citizens.”⁵⁵

6 144. Most (although not all) state commenters took up ACF’s invitation to claim that the
7 requested data elements were overly burdensome, repeating the arguments that they had raised
8 against the 1993 Rule and every attempt to update it since. Their estimated burdens ranged wildly,
9 with some states claiming it would take as many as 70,000 hours to revise their databases to track
10 the non-ICWA data elements and 25,000 hours to do so for ICWA elements. 84 Fed. Reg. at
11 16,573. In other words, some states claimed it would take as much as 95,000 hours—the
12 equivalent of 47.5 people working full-time on nothing else for a year—just to update their
13 computer systems to comply with the 2016 Final Rule, even though they could simultaneously be
14 reimbursed to do exactly that in the CCWIS modernization. By contrast, some states estimated just
15 800 and 200 hours to prepare for the non-ICWA and ICWA elements, respectively—
16 approximately 1% of the high-end estimates. *Id.* Similarly, estimates of staff training ranged from
17 20 hours a year to 102,000 hours a year. *Id.* Consistent with ACF’s invitation to suggest a higher
18 burden, the high-end estimates reflected a massive increase from states’ comments before the 2016
19 Final Rule. *See* 81 Fed. Reg. at 90,568.

20 145. Despite their burden concerns, “the vast majority of states . . . expressed that the
21 2016 final rule was a considerable improvement to the current AFCARS, will improve data
22 reporting, and provide national information on a number of new topics, including ICWA, health
23 needs, and permanency.” 84 Fed. Reg. at 16,573. They similarly “recognized that more
24 comprehensive data allows them to better understand the children and families they serve.” *Id.*

25 146. Various states recommended revisions to nearly every set of data elements,
26 including questions regarding “education, health assessments and conditions, youth

27 ⁵⁵ Adoption and Foster Care Analysis and Reporting System, 84 Fed. Reg. 16,572, 16,573
28 (proposed Apr. 19, 2019) (“2019 NPRM”).

1 pregnancy/fathering, siblings, prior adoptions, caseworker visits, and sex trafficking.” *Id.* at
 2 16,574. Just one-third of the states proposed to cut the sexual orientation questions, while about
 3 half of the state commenters recommended eliminating some of the ICWA elements that ACF had
 4 previously found essential. *Id.*

5 147. At least five states urged ACF to retain the sexual orientation questions,⁵⁶ and at
 6 least three states expressly requested that it retain many or all of the ICWA elements.⁵⁷ When
 7 discussing the state comments, ACF ignored the former altogether and misrepresented the latter as
 8 supporting merely “limited information.” 84 Fed. Reg. at 16,574. For example, ACF claimed that
 9 “states with higher numbers of tribal children in their care reported that they supported including
 10 limited information related to ICWA in AFCARS,” *id.*, when in actuality the state with the largest
 11 number of AI/AN youth in care expressed “steadfast and unequivocal support for the data
 12 collection set forth in the [2016 Final Rule],” specifically singling out its ICWA and LGBTQ+
 13 elements as “necessary for the proper performance of the functions of the agency.”⁵⁸

14 148. Virtually every other commenter opposed the proposed retrenchment. *See id.* They
 15 explained the benefits of the requested data elements, which ACF had previously considered in
 16 issuing the 2016 Final Rule. *Id.*

17
 18 ⁵⁶ Cal. Dep’t of Soc. Servs., Comment Letter on AFCARS Advance Notice of Proposed
 19 Rulemaking (June 5, 2018), <https://www.regulations.gov/document?D=ACF-2018-0003-0016>
 20 (“California ANPRM Comment”); Minn. Dep’t of Hum. Servs., Comment Letter on AFCARS
 21 Advance Notice of Proposed Rulemaking (June 13, 2018),
 22 <https://www.regulations.gov/document?D=ACF-2018-0003-0180>; Ohio Dep’t of Job and Fam.
 23 Servs., Comment Letter on AFCARS Advance Notice of Proposed Rulemaking (June 13, 2018),
 24 <https://www.regulations.gov/document?D=ACF-2018-0003-0143>; Oregon, Comment Letter on
 25 AFCARS Advance Notice of Proposed Rulemaking (June 14, 2018),
 26 <https://www.regulations.gov/document?D=ACF-2018-0003-0210>; Pa. Dep’t of Hum. Servs.,
 27 Comment Letter on AFCARS Advance Notice of Proposed Rulemaking (June 13, 2018),
 28 <https://www.regulations.gov/document?D=ACF-2018-0003-0211>.

⁵⁷ California ANPRM Comment; North Dakota, Comment Letter on AFCARS Advance Notice of
 Proposed Rulemaking (June 12, 2018), <https://www.regulations.gov/document?D=ACF-2018-0003-0119>; Wash. State Child.’s Admin., Comment Letter on AFCARS Advance Notice of
 Proposed Rulemaking (June 13, 2018), <https://beta.regulations.gov/document/ACF-2018-0003-0149>.

⁵⁸ California ANPRM Comment.

1 149. ACF took a strikingly narrow view of these comments, rejecting them as simply
 2 providing “broad commentary on the benefit of having new data outweighs the burden of having
 3 to report it [sic].” *Id.* It largely dismissed these comments as “outside the scope of the ANPRM,”
 4 because they addressed topics such as “ACF’s authority to collect ICWA-related data elements in
 5 AFCARS” or the adequacy of prior “opportunities to comment on AFCARS via prior
 6 rulemakings,” rather than specific “comments on or estimates for cost or burden related to any
 7 aspect of the 2016 final rule.” *Id.*

8 150. ACF’s claim that the commenters that opposed evisceration of the 2016 Final Rule
 9 “did not provide specific comments on . . . cost or burden,” *id.*, was false. Numerous commenters
 10 explained why they believed states’ burden estimates were overstated, explaining, *inter alia*, that
 11 much of the burden of updating states’ systems would exist regardless of the ICWA data elements;
 12 that many states had already begun updating their systems and incurring such costs; and that title
 13 IV–E agencies would need to answer only three ICWA-related data elements for the vast majority
 14 of youth in care, ignoring all others as “not applicable” for the 98% of youth in care to whom
 15 ICWA does not apply.⁵⁹

16 151. Despite ACF’s single-minded solicitude for *state* title IV–E agencies rather than
 17 children and families, it did not even acknowledge that at least five of the tribes that submitted
 18 comments have direct title IV–E agencies, including Plaintiff Cherokee Nation—and all of them
 19 opposed the proposed streamlining. Nor did it acknowledge that California, the state with the
 20 largest AI/AN population in the country and thus the heaviest burden of compliance, supported
 21 retaining the ICWA data elements in full.

22 152. After the comment period closed, ACF issued a new notice of proposed rulemaking
 23 on April 19, 2019. 84 Fed. Reg. at 16,572. ACF stated that the purpose of the 2019 NPRM was “to
 24 reduce the AFCARS reporting burden.” *Id.* It proposed to effectuate this goal by eliminating a data
 25 element about the sexual orientation of youth in foster care aged 14 and older; a data element
 26 about the sexual orientation of foster parents, adoptive parents, and legal guardians; the vast
 27

28 ⁵⁹ See, e.g., Cherokee Nation ANPRM Comment; Child Welfare ANPRM Comment.

1 majority of ICWA-related data elements; and various data elements regarding health assessments,
2 educational stability, juvenile justice involvement, and other issues. *See id.* at 16,576-81.

3 153. In keeping with ACF's single-minded focus on reducing burden, its so-called
4 "Costs and Benefits" section did not acknowledge *any* downsides to eliminating these data
5 elements. *See id.* at 16,572. Instead, it focused solely on the "benefit" of reducing title IV-E
6 agencies' reporting burden. *Id.*

7 154. The 2019 NPRM omitted any mention of the extensive benefits ACF had identified
8 when proposing and enacting the 2016 Final Rule. *See supra* ¶¶ 108, 115, 120, 126-27. The many
9 benefits to youth in foster care, families, title IV-E agencies, and the groups that serve them went
10 completely unconsidered, as did the vast majority of federal purposes ACF believed the new data
11 would advance.

12 155. Instead, ACF identified a vague and much narrower set of goals, limiting the
13 purposes of ACF for the first time to "for title IV-B/IV-E statute and program monitoring,
14 Congressional reporting, budgeting, and areas where reporting of required information to
15 AFCARS would improve the accuracy and reliability of the data in AFCARS." *Id.* at 16,576. This
16 was a significant change in policy from the set of purposes ACF had cited as far back as the 1993
17 Rule. *See supra* ¶¶ 66-70. ACF did not acknowledge that it was limiting its view of AFCARS'
18 purposes, much less provide a reasoned justification for its shift.

19 156. ACF also made two general assertions that directly contradicted its previous
20 conclusions without explanation. First, it claimed that "it was not well illustrated why AFCARS is
21 the best vehicle for collecting this data when there are other effective options for gathering
22 qualitative information at the national level, such as via surveys, research, or the Child and Family
23 Services Review." *Id.* at 16,575. ACF had previously analyzed this exact issue and concluded that
24 "AFCARS is the only comprehensive case-level data set on the incidence and experiences of
25 children who are in out-of-home care under the placement and care of the title IV-E agency or
26 who are adopted under a title IV-E adoption assistance agreement." 81 Fed. Reg. at 90,565; *see*
27 *supra* ¶ 130. ACF did not acknowledge this prior reasoning and made no effort to explain the
28 analysis that prompted this reversal. Nor did it attempt to explain or justify its characterization of

1 the data as “qualitative.”

2 157. Second, ACF claimed that the comments did not “sufficiently validate[]” the
3 assertion that the data elements in the 2016 Final Rule were “essential for policy making.” 84 Fed.
4 Reg. at 16,575. Of course, this was not just commenters’ opinion, but ACF’s own position during
5 the prior rulemaking—a fact that ACF again failed even to acknowledge, much less rebut. *See*,
6 *e.g.*, 81 Fed. Reg. at 90,527, 90,556.

7 158. The only justification ACF proffered was the non sequitur that “Congress has
8 passed approximately 24 laws that significantly amended federal child welfare programs since
9 1995, when AFCARS became effective.” 84 Fed. Reg. at 16,575. The fact that Congress had
10 passed legislation amending child welfare programs does not suggest that the data at issue would
11 not aid future policymaking. For example, sections 50701-82 of the Family First Prevention
12 Services Act, signed into law in February 2018, requires states to reduce the number of children in
13 congregate care and utilize evidence-based treatment programs—the exact kinds of efforts that
14 data collection would inform. *See* 42 U.S.C. § 671(e)(5)(B)(vii). ACF’s decision to pull elements
15 that would provide national data regarding placement and permanency for LGBTQ+ and AI/AN
16 youth and promote the ability to measure the success of programs through enhanced data
17 collection is in direct conflict to its assertion that Congress’s actions weigh against Defendants’
18 disfavored data elements.

19 159. As to its specific proposed revisions, ACF provided at best brief and insufficient
20 rationales.

21 160. For example, regarding the sexual orientation questions, the 2019 NPRM opined
22 that

23 asking for sexual orientation may be perceived as intrusive and worrisome to those
24 who have experienced trauma and discrimination as a result of gender identity or
25 sexual orientation. This would be a mandatory conversation a worker must have in
26 order to complete the data elements. Mandating such a conversation may be
27 contraindicated based on a child’s history of abuse or neglect.

28 84 Fed. Reg. at 16,576.

161. Here again, ACF had previously considered and rejected this exact contention,

1 noting that a response from youth was voluntary and that guidelines existed for asking such
 2 questions sensitively and safely. *See, e.g.*, 81 Fed. Reg. at 90,526, 90,535; *see also supra* ¶ 123.
 3 The 2019 NPRM did not attempt to explain why ACF had abandoned this view, nor address the
 4 fact that other HHS divisions already collect sexual orientation information for youth.⁶⁰ Nor did
 5 ACF provide any basis for its pseudoscientific speculation that asking a question about sexual
 6 orientation on a voluntary basis may be “contraindicated based on a child’s history of abuse or
 7 neglect.” 84 Fed. Reg. at 16,576.

8 162. The 2019 NPRM also purported to rely on a white paper issued by an Office of
 9 Management and Budget working group.⁶¹ According to ACF, the OMB White Paper “advises
 10 that new questions added to a survey or data base should be validated with qualitative techniques
 11 and question validation efforts should include both the SOGI [i.e., sexual orientation and gender
 12 identity] and non-SOGI groups.” 84 Fed. Reg. at 16,576. ACF asserted that its abandonment of the
 13 sexual orientation questions was based “in particular” on this validation concern. *Id.*

14 163. However, ACF misrepresented the OMB White Paper’s recommendations. The
 15 working group did not recommend that validation testing be employed for any “new questions
 16 added to a survey or data base.” *Id.* Rather, it recommended validation only when an agency
 17 chooses to develop a question not previously used on other surveys or used in “a new setting with
 18 a different audience.” OMB White Paper at 17. The questions ACF incorporated in the 2016 Final
 19 Rule were taken directly from the Centers for Disease Control and Prevention’s Youth Risk
 20 Behavior Surveillance System (“YRBSS”), whose questions the OMB White Paper explicitly
 21 recognized as one of the “main ways sexual identity is asked in Federal surveys/studies.” *Id.* at 5,
 22 9. Indeed, the 2016 Final Rule had expressly rejected suggestions to broaden the questions beyond
 23

24 ⁶⁰ *See, e.g.*, Hum. Rts. Campaign, Comment Letter on AFCARS Advance Notice of Proposed
 25 Rulemaking (June 13, 2018), <https://www.regulations.gov/document?D=ACF-2018-0003-0161>.

26 ⁶¹ *See* Fed. Interagency Working Group on Improving Measurement of Sexual Orientation and
 27 Gender Identity in Fed. Survs., *Current Measures of Sexual Orientation and Gender Identity in*
 28 *Federal Surveys* (2016) (“OMB White Paper”), [https://cpb-us-
 e1.wpmucdn.com/sites.northwestern.edu/dist/3/817/files/2017/01/WorkingGroupPaper1_Current
 Measures_08-16-1xnai8d.pdf](https://cpb-us-e1.wpmucdn.com/sites.northwestern.edu/dist/3/817/files/2017/01/WorkingGroupPaper1_CurrentMeasures_08-16-1xnai8d.pdf).

1 the YRBSS model, hewing to the precise questions approved by the OMB White Paper. *See* 81
2 Fed. Reg. at 90,534.

3 164. The purported justification of intrusiveness is even flimsier with regard to the
4 elimination of data elements reporting the sexual orientation of foster parents, adoptive parents,
5 and legal guardians. Foster parent home studies to determine suitability routinely involve
6 questions about relationships, relationship history, familial history, and relationship status—
7 realities of child welfare casework that ACF did not acknowledge. Moreover, ACF’s suggestion
8 that sexual orientation could be “gleaned” from parents’ and guardians’ “sex and marital status,”
9 84 Fed. Reg. at 16,577, is the same type of flawed inference that HHS had long recognized as a
10 shortcoming of the pre-2016 AFCARS questions. *See* 2003 OIG Report at 6 (criticizing data
11 limitations under which an aunt and uncle serving as a foster family would be reported only as a
12 “Married Couple”). ACF’s inferential method would lead to inaccurate results and be entirely
13 useless for single and unmarried parents and guardians.

14 165. The 2019 NPRM also failed to address the benefits identified in the 2016 Final
15 Rule with regard to gathering sexual orientation data. In the 2016 Final Rule, ACF noted that the
16 questions would enable the agency “to move closer toward our goal to better support children and
17 youth in foster care who identify as LGBTQ and ensure that foster care placement resources and
18 services are designed appropriately to meet their needs” and would “assist title IV–E agencies in
19 recruiting and training foster care providers in meeting the needs of these youth.” 81 Fed. Reg. at
20 90,534-35. The 2019 NPRM failed to acknowledge, let alone explain away, its change in position
21 as to these benefits.

22 166. Similarly, the 2019 Proposed Rule eliminated the vast majority of ICWA-related
23 data elements, despite having found just three years earlier that each one was essential to evaluate
24 whether AI/AN youth were being appropriately treated and where ACF could provide additional
25 resources and guidance. *See supra* ¶¶ 126-28.

26 167. For example, where the 2016 Final Rule required title IV–E agencies to report, for
27 each child to whom ICWA applies, whether they had inquired about the child’s status with the
28 child and the child’s biological or adoptive parents, Indian custodian, and extended family, as

1 required by ICWA, *see* 81 Fed. Reg. at 90,570 (codifying requirements at 45 C.F.R. §
 2 1355.44(b)(3)), the 2019 NPRM proposed to require title IV–E agencies only to report generically
 3 whether they made undefined “inquiries,” *see* 84 Fed. Reg. at 16,577, 16,579. Similarly, the 2019
 4 NPRM struck nearly all data elements tracking implementation of the ICWA provisions designed
 5 to prevent unwarranted removals and keep AI/AN children within tribal communities where
 6 possible. *Compare* 81 Fed. Reg. at 90,574-78 (codifying requirements at 45 C.F.R. §
 7 1355.44(d)(3), (e)(8)-(11)) *with* 84 Fed. Reg. at 16,577, 16,594, 16,597.

8 168. For most of the abandoned data elements, ACF did not even attempt to engage with
 9 its previous analysis. For example, as discussed above, ACF previously concluded that questions
 10 about the specific types of ICWA-related placement options available were “essential for ACF to
 11 determine whether resources are needed for recruitment to increase the availability of AI/AN
 12 homes that can meet ICWA’s placement preferences.” 81 Fed. Reg. at 90,552; *see supra* ¶ 126.
 13 The 2019 Proposed Rule did not acknowledge this conclusion, much less explain its reasons for
 14 departing from it.

15 169. Instead, the 2019 Proposed Rule generally provided a generic and conclusory
 16 rationale that such data were “better suited for a qualitative review.” 84 Fed. Reg. at 16,574; *see*
 17 *also, e.g., id.* at 16,577-78. But nearly all of the data elements ACF proposed to cut were yes/no
 18 options, dates of recorded events, or similarly quantitative and discrete facts. *See* 81 Fed. Reg. at
 19 90,584-97. As numerous commenters pointed out, these were not “qualitative” by any definition,
 20 and were facially *less* qualitative than other questions ACF was retaining.⁶² ACF did not explain
 21 how these were in any relevant sense “qualitative.” Nor did it attempt to explain how it or any
 22 other entity might conduct a “qualitative review” of information that AFCARS did not collect, let
 23 alone on the “comprehensive national” level that the Act requires, 42 U.S.C. § 679(c)(3), or
 24 compare the costs of such a hypothetical “qualitative review” against the purported savings from
 25 eliminating the data elements from AFCARS.

26
 27 ⁶² *See, e.g.,* Seattle U. Sch. of L. Ctr. For Indian L. & Pol’y, Comment Letter on AFCARS Notice
 28 of Proposed Rulemaking (July 17, 2019) (“Ctr. for Indian Law & Pol’y NPRM Comment”),
<https://beta.regulations.gov/document/ACF-2018-0003-0284>.

170. ACF also claimed that it would use the State Court Improvement Program (“CIP”) instead of AFCARS to address the issues.⁶³ 84 Fed. Reg. at 16,578. The 2019 Proposed Rule promised that “the next program instruction for the CIP will encourage grantees to work with the dependency courts across their jurisdictions to enhance efforts to collect and track key ICWA data indicators.” *Id.* This proved a hollow promise: when ACF sought to renew its CIP program instruction five months later, it submitted it with “minimal updates” that did not address ICWA at all.⁶⁴

171. Finally, ACF took the title IV–E agencies’ estimates at face value, even though some states reported it would take nearly *50 person-years* of full-time work to update their systems. *See supra* ¶ 144. ACF made no effort to determine whether the new estimates were reasonable or to eliminate outlier data, simply adopting the median estimate for development costs and average estimate for annual reporting burdens. 84 Fed. Reg. at 16,587. ACF did not explain why it chose to use the median for one figure and average for another, an approach it had not used in the 2016 Final Rule.

172. ACF also changed its methodology for estimating the hours needed for reporting and recordkeeping for each child in care. In the 2016 Final Rule, ACF separately calculated burdens for children to whom ICWA applies and those it does not, estimating 13 hours per child for the former and 3 hours per child for the latter. *See* 81 Fed. Reg. at 90,568. This differential estimate was appropriate because title IV–E agencies need to answer only three questions for children to whom ICWA does not apply, marking the rest as not applicable. *See id.* at 90,570; *see supra* ¶ 109. Because there were 273,539 children in care, but only 6,044 reported to be American Indian or Alaska Native, this methodology resulted in a total estimate of 872,027 hours. 81 Fed. Reg. at 90,568.

⁶³ CIP is a statutorily mandated program that provides funding to state court systems to assess certain aspects of their child welfare proceedings. *See* 42 U.S.C. § 629h; Children’s Bureau, Court Improvement Program (May 7, 2012), <https://www.acf.hhs.gov/cb/resource/court-improvement-program>.

⁶⁴ Submission for OMB Review; State Court Improvement Program (OMB #0970–0307), 84 Fed. Reg. 50,847, 50,847 (Sept. 26, 2019).

173. By contrast, the 2019 Proposed Rule lumped *all* children together, even though the vast majority of ICWA questions would be asked of just 2 percent of children (*i.e.*, 6,044 out of 273,539). *See* 84 Fed. Reg. at 16,589. This unexplained methodological change increased the estimate for *all* children to 6 hours per child, including the 98% of children for whom title IV–E agencies would only need to answer three questions. This unreasoned and unjustifiable change nearly doubled ACF’s estimate of the burden of the 2016 Final Rule. *Id.*

174. Similarly, ACF’s method for estimating the cost savings to states appeared to assume that all questions would be asked of all youth, even though title IV–E agencies would need to report only three threshold questions regarding whether ICWA applied at all for 98% of youth. Despite the small minority of cases in which the cost savings would occur, the 2019 Proposed Rule assumed a 33% across-the-board cost savings, significantly inflating the apparent savings. *Id.* at 16,586.

175. Nor did ACF attempt to disaggregate the portion of costs that title IV–E agencies would be incurring even without the 2016 Final Rule as they converted their systems to CCWIS, as commenters noted.⁶⁵ Similarly, it failed to account for the progress that some states reported having made since the 2016 Final Rule’s promulgation, which would presumably reduce the burden of finishing their efforts to come into compliance. Instead, it increased its cost estimates even for states that had already begun implementing the 2016 Final Rule.

2. 2020 Final Rule

176. The comment period from the 2019 Proposed Rule produced “150 comments from 24 state and local child welfare agencies; 33 Indian tribes, tribal organizations or consortiums; 10 organizations representing tribal interests; 45 national advocacy groups and universities; one Member of Congress; and 37 anonymous or private citizens.”⁶⁶

177. As before, many—but not all—of the state title IV–E agencies supported

⁶⁵ *See, e.g.*, Children’s Defense Fund, Comment Letter on AFCARS Advance Notice of Proposed Rulemaking (June 13, 2018), <https://beta.regulations.gov/document/ACF-2018-0003-0212>.

⁶⁶ Adoption and Foster Care Analysis and Reporting System, 85 Fed. Reg. 28,410, 28,411 (May 12, 2020) (“2020 Final Rule”).

1 eliminating data elements on the basis of putative burden concerns. *See* 85 Fed. Reg. at 28,411.
 2 And as before, virtually all other commenters opposed the changes. *Id.* This included five tribes
 3 that operated direct title IV–E agencies and opposed the elimination of the requirements. Once
 4 again, ACF did not even acknowledge the tribal IV–E agencies’ position. *See supra* ¶ 151. Nor did
 5 it respond to the state title IV–E agencies that specifically supported the sexual orientation and
 6 ICWA data elements. *See supra* ¶ 147 & nn.56-58.

7 178. Despite the overwhelming majority of comments, ACF finalized the changes that it
 8 had proposed in the Proposed Rule on May 12, 2020. The 2020 Final Rule, issued by Defendants
 9 HHS and ACF and signed by Defendants Azar and Johnson, retained and exacerbated the errors in
 10 the Proposed Rule.

11 179. The sole purpose of the changes, according to the 2020 Final Rule’s executive
 12 summary, was to comply with a 2017 executive order that directed agencies to identify regulations
 13 that could be repealed or modified.⁶⁷ 85 Fed. Reg. at 28,410. ACF did not attempt to explain why
 14 the executive order supported its decision; it simply cited the order as a conclusory justification for
 15 its choice. But as one commenter had pointed out, *none* of the six criteria that the executive order
 16 directed deregulating agencies to consider applied to the 2016 Final Rule.⁶⁸ Five of the
 17 considerations were entirely inapplicable. *See* 82 Fed. Reg. at 12,286 (directing agencies to
 18 identify regulations that eliminate jobs; are outdated, unnecessary, or ineffective; interfere with
 19 regulatory reform initiatives and policies; are inconsistent with the requirements of 44 U.S.C. §
 20 3516; or implement rescinded or substantially modified executive orders).

21 180. The only factor in the executive order that was even plausibly relevant to the 2020
 22 Final Rule was its inquiry whether the regulation “impose[s] costs that exceed benefits.” *Id.* But,
 23 as in the 2019 NPRM, the 2020 Final Rule did not even acknowledge the benefits of the 2016
 24 Final Rule, let alone explain why they were exceeded by the costs. *See* 85 Fed. Reg. at 28,410

25 _____
 26 ⁶⁷ Exec. Order No. 13777, Enforcing the Regulatory Reform Agenda, 82 Fed. Reg. 12,285 (Feb.
 24, 2017).

27 ⁶⁸ *See* Sault Ste. Marie Tribe of Chippewa Indians, Comment Letter on AFCARS Notice of
 28 Proposed Rulemaking (June 3, 2019) (“Sault Ste. Marie NPRM Comment”),
<https://www.regulations.gov/document?D=ACF-2018-0003-0250>.

(under “Costs and benefits,” listing only the supposed cost savings of eliminating portions of the 2016 Final Rule).

181. Commenters identified numerous benefits from the 2016 Final Rule that would be lost with the proposed changes, and thus represented factors that ACF needed to take into consideration. Just to name a few examples, commenters explained that: states would save money because the data would allow for better targeting of resources and provision of services, leading to more placement stability and less need to house youth in expensive congregate care facilities;⁶⁹ strengthen and promote ICWA’s mandates to protect Indian families and communities;⁷⁰ help ACF and states to better recruit foster and adoptive parents;⁷¹ allow ACF and others to identify discrimination and other factors negatively impacting children’s safety and well-being;⁷² allow ACF to examine the unique experiences of AI/AN LGBTQ+ youth;⁷³ and help tribes vindicate their rights and the rights of their youth, and to work with states to improve ICWA compliance.⁷⁴

182. ACF did not acknowledge *any* of these lost benefits. Nor did it explain why it was abandoning its prior conclusion that the 2016 Final Rule advanced these goals. Instead, it simply reached the vague and unreasoned conclusion that it did not “have a sufficient justification, or a rational basis, for retaining the data elements proposed for removal.” *Id.* at 28,411.

183. Like it did in the 2019 NPRM, ACF construed AFCARS to have a sharply constrained purpose, limited only to “a title IV–B or IV–E statutory requirement, program

⁶⁹ *E.g.*, Hum. Rts. Campaign, Comment Letter on AFCARS Notice of Proposed Rulemaking (June 18, 2019) (“Hum. Rts. Campaign NPRM Comment”), <https://beta.regulations.gov/document/ACF-2018-0003-0339>.

⁷⁰ *E.g.*, Tribal L. & Pol’y Inst., Comment Letter on AFCARS Notice of Proposed Rulemaking (June 13, 2019), <https://beta.regulations.gov/document/ACF-2018-0003-0270>.

⁷¹ *E.g.*, Hum. Rts. Campaign NPRM Comment.

⁷² *E.g.*, Port Gamble S’Klallam Tribe, Comment Letter on AFCARS Notice of Proposed Rulemaking (June 17, 2019), <https://www.regulations.gov/document?D=ACF-2018-0003-0362>.

⁷³ *E.g.*, Lambda Legal NPRM Comment; Rep. Karen Bass, Comment Letter on AFCARS Advance Notice of Proposed Rulemaking (Jun 12, 2018), <https://www.regulations.gov/document?D=ACF-2018-0003-0106> (“Rep. Bass ANPRM Comment”).

⁷⁴ *E.g.*, Ctr. for Indian L. & Pol’y NPRM Comment.

1 monitoring, Congressional reporting, or budgeting.” *Id.* at 28,410. This was a significant yet
 2 unacknowledged and unexplained shift from ACF’s historic interpretation of AFCARS. *See supra*
 3 ¶¶ 66-70, 114.

4 184. Indeed, this statement was inconsistent even with how ACF *currently* represents its
 5 uses of AFCARS outside of this rulemaking. ACF’s website, which ACF reviewed but did not
 6 change after issuing the 2020 Final Rule, identifies numerous ways “ACF uses AFCARS data”
 7 that go well beyond the stunted purposes claimed in the 2020 Final Rule, including “[p]reparing
 8 the Child Welfare Outcomes report,” “[c]onducting trend analyses and short- and long-term
 9 planning efforts,” “[t]argeting areas for initial or increased technical assistance efforts,
 10 discretionary service grants, research and evaluation, and regulatory changes,” and “[r]esponding
 11 to request[s] for data from federal, state, tribal, and private agencies.”⁷⁵

12 185. ACF did not acknowledge, much less explain, the inconsistencies between this
 13 historic and continuing view of AFCARS’ uses and the limited view it expressed in the 2020 Final
 14 Rule.

15 186. Similarly, ACF largely chose not to respond to the many arguments raised against
 16 its proposal. Instead, it downplayed the analyses provided by the overwhelming body of adverse
 17 commenters because they “were not agencies responsible for reporting data to AFCARS.” *Id.* at
 18 28,412. This was yet another unexplained departure from the approach ACF took in the 1993 and
 19 2016 rulemaking processes. *See, e.g.*, 58 Fed. Reg. at 67,912 (including “national advocacy
 20 organizations” among the groups that had an interest in AFCARS information). Nor was it true of
 21 the five tribal title IV–E agencies that opposed the changes, including Plaintiff Cherokee Nation.
 22 ACF purported to reject these comments because they were broadly similar to the comments
 23 offered in response to the 2018 ANPRM, 85 Fed. Reg. at 28,412, even though the 2019 NPRM
 24 had not responded to most of the points raised in those comments.

25 187. To the limited extent that ACF acknowledged the substance of adverse comments,
 26 it significantly mischaracterized them. For example, ACF claimed that

27 ⁷⁵ Children’s Bureau, About AFCARS, (July 2, 2012), <https://www.acf.hhs.gov/cb/resource/about-afcars>.
 28 The website states that ACF last reviewed it on June 5, 2020.

The commenters that opposed streamlining [a] did not elaborate on why AFCARS is the most effective vehicle for collecting the information required under the 2016 final rule that we proposed to remove, which in large part was qualitative data, [b] describe work done to coordinate with title IV–E agencies in collecting and reporting data for AFCARS, or [c] specify how the data we proposed to remove would help their specific work with children and families served by the title IV–E agency.

Id. Each of these contentions was demonstrably false. For example:

- a. Commenters explained that “[p]revious attempts to capture ICWA data through case file reviews have failed[,]”⁷⁶ identifying specific deficits with existing processes for attempting to capture the data and explaining why ACF was better positioned to collect the information from child welfare agencies than the Department of Interior, which “does not have a relationship with state child welfare agencies and does not have an operational data base or resources to collect data on Indian children in state foster care systems.”⁷⁷
- b. Commenters, including some states, described specific engagement with title IV–E agencies to improve data collection, as well as state efforts to collect similar data that had proven effective and administrable.⁷⁸
- c. Commenters explained in detail how the questions they were removing would help their specific work with children and families, such as representing youth in court proceedings⁷⁹ or identifying deficits in state ICWA practices.⁸⁰

188. Rather than respond to this and other evidence, ACF vaguely criticized commenters

⁷⁶ Sault Ste. Marie NPRM Comment.

⁷⁷ Nat’l Congr. of Am. Indians, Comment Letter on AFCARS Notice of Proposed Rulemaking (June 18, 2019) (“Nat’l Congr. of Am. Indians NPRM Comment”), <https://www.regulations.gov/document?D=ACF-2018-0003-0365>.

⁷⁸ See, e.g., Cal. Dep’t of Soc. Servs., Comment Letter on AFCARS Notice of Proposed Rulemaking (June 18, 2019), <https://www.regulations.gov/document?D=ACF-2018-0003-0328>; Ctr. for the Study of Soc. Pol’y, Comment Letter on AFCARS Notice of Proposed Rulemaking (June 18, 2019), <https://www.regulations.gov/document?D=ACF-2018-0003-0308>.

⁷⁹ See, e.g., Nat’l Ass’n of Couns. for Child., Comment Letter on AFCARS Notice of Proposed Rulemaking (June 18, 2019), <https://www.regulations.gov/document?D=ACF-2018-0003-0300..>

⁸⁰ See, e.g., Ctr. for Indian L. & Pol’y NPRM Comment.

1 as “misunderstanding . . . AFCARS and its functionality.” 85 Fed. Reg. at 28,412. As ACF noted,
 2 “[t]he information that title IV–E agencies report to AFCARS is aggregated and de-identified at
 3 the national level.” *Id.* But, contrary to ACF’s apparent understanding, commenters
 4 overwhelmingly focused on the benefits of aggregate data and a national and state-by-state
 5 demographic picture—the exact point ACF accused them of misunderstanding.

6 189. Furthermore, ACF acknowledged that it *does* “release specific information
 7 regarding a child’s tribal membership or ICWA applicability to . . . the Indian tribe of which the
 8 child is or may be a member.” *Id.* at 28,413. Thus, for the tribal commenters, including Plaintiffs
 9 Yurok Tribe and Cherokee Nation, the omitted elements would provide a wealth of information
 10 regarding what happened to specific youth members of their tribes, useable in advocating for the
 11 tribes’ and their children’s rights. Moreover, ACF ignored comments pointing out that tribes had
 12 relied on the 2016 Final Rule, working with state child welfare agencies to develop or update
 13 agreements about data collection to match the 2016 Final Rule.⁸¹

14 190. ACF claimed without explanation that some removed data elements might not be
 15 reliable. *See, e.g., id.* at 28,419. But as noted above, its changes actually *reduce* the reliability of
 16 information, relying on speculation about sexual orientation rather than data, *see supra* ¶ 164, and
 17 vague generalities about inquiries into ICWA children’s status rather than the specific inquiries
 18 defined by ICWA, *see supra* ¶ 167.

19 191. ACF also asserted that “the 2016 final rule ICWA-related data elements would not
 20 be available for ICWA compliance purposes because ACF is unable to release information to other
 21 entities that could use it for this purpose.” *Id.* at 28,413. But ACF did not identify any legal
 22 barriers that would prevent it from sharing the relevant data with the Bureau of Indian Affairs,
 23 with which it had collaborated in issuing the 2016 Final Rule. *See* 81 Fed. Reg. at 90,525. Nor,
 24 assuming some such barrier existed, did it deny that aggregate data could be used to determine
 25 how effectively a state was complying with its obligations.

26
 27 ⁸¹ *See, e.g.,* Confederated Tribes of Siletz Indians of Oregon, Comment Letter on AFCARS
 28 Advance Notice of Proposed Rulemaking (June 6, 2018),
<https://beta.regulations.gov/document/ACF-2018-0003-0021>.

1 192. ACF likewise misstated its authority to collect the data, claiming that it has
2 “authority only for the collection of data elements that are used for functions and oversight under
3 HHS authority, namely the title IV–B and IV–E programs.” 85 Fed. Reg. at 28,412. In particular,
4 it claimed, “[t]he AFCARS statute does not provide authority for ACF to require states to report
5 specific details on ICWA’s requirements in AFCARS to be used for ICWA compliance.” *Id.* This
6 is not a plausible reading of the Act, which requires states to report on “the specific measures
7 taken by the State to comply with the Indian Child Welfare Act,” 42 U.S.C. § 622(b)(9), and
8 requires ACF to collect data on both “the status of the foster care population” and “the extent and
9 nature of assistance provided by Federal, State, and local adoption and foster care programs and
10 the characteristics of the children with respect to whom such assistance is provided.” 42 U.S.C. §
11 679(c)(3)(B), (D). ACF noted that it is not authorized to “determine compliance with ICWA
12 and/or penalize states for failure to comply with ICWA,” 85 Fed. Reg. at 28,412, but that is simply
13 a non sequitur as to its authority to collect data. Nothing in the statute prohibits ACF from
14 collecting data simply because it could be used by another agency for compliance purposes.

15 193. Moreover, this was a 180-degree reversal from ACF’s position in the 2015 SNPRM
16 and 2016 Final Rule, when it explicitly concluded that it had “authority to collect state-level
17 ICWA-related data” after “an extensive re-evaluation of the scope of ACF’s statutory and
18 regulatory authority.” 81 Fed. Reg. at 20,284. ACF did not even acknowledge, much less attempt
19 to explain the rationale for, its change in position.

20 194. The 2020 Final Rule also repeated its assurance from the 2019 Proposed Rule that
21 “the next Court Improvement Program (CIP) program instruction will emphasize collecting and
22 tracking ICWA-related data and will be coupled with technical assistance through the CB’s
23 technical assistance provider for CIP grantees and the courts to help address this historic and
24 ongoing information gap.” 85 Fed. Reg. at 28,424; *see also* 84 Fed. Reg. at 16,578. This was at
25 best disingenuous: as noted earlier, ACF had *already issued* a new CIP program instruction since
26 the 2019 NPRM, making no mention of ICWA at all. 84 Fed. Reg. at 50,847. Indeed, it had
27 described that reissuance as a “three-year extension” of the preexisting CIP program instruction,
28 *id.*, meaning that ACF in fact had no intention of issuing a new CIP program instruction—let

1 alone one dealing with ICWA—until September 2022, at the earliest. And even if ACF does
 2 intend to take action under the auspices of CIP at some point in the future, it made no effort to
 3 determine how the costs of collecting the data through CIP compare to collecting it in AFCARS.

4 195. The 2020 Final Rule fared no better in attempting to justify its decision to eliminate
 5 the two data elements regarding the sexual orientation of youth, foster and adoptive parents, and
 6 legal guardians.

7 196. Fewer than half of the 24 states that responded to the 2019 Proposed Rule agreed
 8 with the proposal to eliminate the sexual orientation data elements. 85 Fed. Reg. at 28,411. Thus,
 9 more than half of the states were silent or opposed ACF’s proposal, as did virtually all of the
 10 organizations, individuals, and tribes that commented. *Id.* Nonetheless, ACF adopted the minority
 11 view with less than half a page of analysis. *See id.* at 28,413.

12 197. As it did throughout the Final Rule, ACF ignored comments that opposed
 13 eliminating the requirements. It acknowledged that commenters explained that the data “would (1)
 14 enhance recruitment of foster homes; (2) aid permanency and case decision-making; (3) promote
 15 visibility for marginalized groups; (4) help to analyze youth outcomes; (5) address disparities; and
 16 (6) enable Congress to legislate appropriately at the national-level [sic].” *Id.* Neither the 2020
 17 Final Rule nor the 2019 NPRM rebutted this evidence.

18 198. ACF was entirely silent as to how eliminating the sexual orientation data was
 19 consistent with its statutory obligation to “provide comprehensive national information with
 20 respect to . . . the demographic characteristics of adoptive and foster children and their biological
 21 and adoptive or foster parents.” 42 U.S.C. § 679(c)(3)(A).⁸² Nor did it mention how it would be
 22 possible to address over-representation of LGBTQ+ youth in care, including youth of color, and
 23 the litany of poor outcomes for LGBTQ+ youth without state-level and nationwide data, data that
 24 is clearly quantitative in nature—points that were specifically raised by commenters, including
 25 nearly half of the state agencies that discussed the sexual orientation data elements in particular.

26
 27 ⁸² *See, e.g.*, Rep. Bass ANPRM Comment (“[T]o be comprehensive as required by sec. 479,
 28 AFCARS must include data elements related to race, sex, sexual orientation, gender, and tribal
 affiliation.”).

199. ACF's defense of its view that the data could not be confidentially collected was similarly insufficient. In response to numerous comments identifying guidelines that provided best practices for collecting sexual orientation information,⁸³ the 2020 Final Rule concluded that "those guidelines are not relevant to collecting sexual orientation information through a Federal administrative data collection" because they provided guidelines "for child welfare staff and child welfare agencies on how they interact with clients, and gather and manage SOGI information at the case, local, and state level." 85 Fed. Reg. at 28,413. But of course, all of the information that is eventually reported to AFCARS is collected by child welfare staff and agencies through their interactions with clients; it consists entirely of information gathered and managed at the case level. The guidelines are thus directly on point, and the 2020 Final Rule's basis for dismissing them is nonsensical. Moreover, case workers already collect sensitive information that is reported to AFCARS such as abuse history, reproductive health decisions, trafficking, and mental health diagnoses and medications. ACF made no effort to explain why voluntarily disclosed sexual orientation could not be recorded and safeguarded in a consistent manner.

200. Here again ACF failed to explain its reversal of its earlier position. In the 2016 Final Rule, ACF had explicitly noted the usefulness of such guidelines in ensuring that sexual orientation information was "obtained and maintained in a manner that reflects respectful treatment, sensitivity, and confidentiality." 81 Fed. Reg. at 90,526. The 2020 Final Rule did not explain its change in view; indeed, it did not even acknowledge it.

201. ACF's only other response to the comments opposing the deletion of the sexual orientation questions was that such information "can be collected as part of the title IV-E agency's casework and should be documented in the case file, if it pertains to the circumstances of the child, and reporting it to a national database would not enhance [title IV-E agencies'] work with children and families." 85 Fed. Reg. at 28,413. But as numerous commenters explained, national

⁸³ See Fam. Builders, Legal Servs. for Child., Nat'l Ctr. for Lesbian Rts., & Ctr. for the Study of Soc. Pol'y, *Guidelines for Managing Information Related to the Sexual Orientation & Gender Identity and Expression of Children in Child Welfare Systems* (2013), <https://cssp.org/wp-content/uploads/2018/08/Guidelines-for-Managing-Information-Related-to-the-Sexual-Orientation-Gender-Identity-and-Expression-of-Children-in-Child-Welfare-Systems.pdf>.

1 data is needed not just to work with individual children but to determine why LGBTQ+ youth
 2 experience worse outcomes, such as greater placement instability and homelessness; to identify
 3 what can be done to increase family permanency; and to guide federal, state, and non-
 4 governmental allocation of resources.⁸⁴ ACF did not attempt to explain how similar analyses—or
 5 the programmatic improvements, resource allocations, and policy changes that would grow from
 6 them—could be performed with the data documented only in individual case files. Nor did it
 7 explain why it no longer viewed these goals, which ACF had espoused in the 2016 Final Rule, *see*,
 8 *e.g.*, 81 Fed. Reg. at 90,526, 90,534-35, to be a purpose of AFCARS. *Cf.* 58 Fed. Reg. at 67,912
 9 (noting that one purpose of AFCARS data is “for research, the ultimate purpose of which is to
 10 gain a better understanding of the foster care program”).

11 202. ACF also rejected out of hand numerous commenters’ suggestion that they add a
 12 third gender option to allow respondents to provide a gender other than male or female and to
 13 include gender identity. *See* 85 Fed. Reg. at 28,417. ACF’s only explanation was that the agency
 14 “ha[s] no need for it at the Federal level.” *Id.* But the relevant statutory test is not how ACF plans
 15 to use the data, but whether it is part of “the demographic characteristics of adoptive and foster
 16 children and their biological and adoptive or foster parents.” 42 U.S.C. § 679(c)(3)(A). ACF did
 17 not in any way address this statutory consideration.

18 203. Indeed, ACF essentially did not consider any alternatives to its preordained plan.
 19 The only alternative it considered was “not streamlining the data elements, meaning that the 2016
 20 final rule would go into effect.” 85 Fed. Reg. at 28,419. But many other alternatives were
 21 presented to ACF, from providing additional technical assistance or funding to title IV–E
 22 agencies⁸⁵ to staggering compliance or penalty dates.⁸⁶ ACF was entirely silent regarding these
 23 proposals.

24 204. ACF’s burden analysis was substantively unchanged from its analysis in the 2019
 25

26 ⁸⁴ *See, e.g.*, Nat’l Ctr. for Transgender Equal., Comment Letter on AFCARS Notice of Proposed
 27 Rulemaking (July 18, 2019), <https://www.regulations.gov/document?D=ACF-2018-0003-0303>.

28 ⁸⁵ *See, e.g.*, Cherokee Nation ANPRM Comment.

⁸⁶ *See, e.g.*, Nat’l Congr. of Am. Indians NPRM Comment.

1 Proposed Rule. *See id.* at 28,420-22; *see also supra* ¶¶ 171-75. It did not acknowledge, much less
 2 discuss, the facts and arguments that numerous commenters—including some state and tribal title
 3 IV-E agencies—provided that showed that that estimate was likely inflated. For example, it did
 4 not attempt to justify its treatment of the ICWA questions as if every question would be asked of
 5 all youth in care, as opposed to just the 2 percent of youth to whom ICWA applies.⁸⁷ Nor did it
 6 address the concern that delaying the changes would eliminate the cost savings from timing the
 7 changes to go with states' CCWIS updates,⁸⁸ or that at least 15 states have enacted their own
 8 ICWA data collection requirements and thus would see little cost increase due to the federal
 9 requirement.⁸⁹ And it ignored commenters' point that much of the putative expense appeared to
 10 come from the fact that many states are not currently complying with ICWA, and they would need
 11 to begin meeting their obligations to be able to report the required data.⁹⁰ ACF simply disregarded
 12 these and many other criticisms, rather than provide a reasoned explanation for its unbalanced
 13 burden estimate. Nor did it compare the supposed burden against the benefits that would be lost
 14 from eliminating the data.

15 205. Finally, ACF provided states with an additional two years to comply with its
 16 changes, even though it was allegedly *reducing* the burden from what states had been preparing
 17 for since 2016. *Id.* at 28,411. States will not need to comply with the new requirements, including
 18 data elements added to implement explicit statutory commands, until October 1, 2022. *Id.* at
 19 28,413. This is five years and nine months from the issuance of the 2016 Final Rule—even though
 20 all states indicated that they could comply sooner at the time. *See* 81 Fed. Reg. at 90,529; *see also*
 21 *supra* ¶ 131. ACF did not balance this delay against the lost years of national data required by
 22 Congress, or consider implementing the data elements that had been undisputed since 2016 on a
 23 faster timetable.

24 _____
 25 ⁸⁷ *See, e.g.,* Oneida Nation, Comment Letter on AFCARS Notice of Proposed Rulemaking (June
 18, 2019), <https://www.regulations.gov/document?D=ACF-2018-0003-0338>.

26 ⁸⁸ *See, e.g.,* Lambda Legal NPRM Comment.

27 ⁸⁹ *See, e.g.,* Cherokee Nation, Comment Letter on AFCARS Notice of Proposed Rulemaking (June
 17, 2019), <https://www.regulations.gov/document?D=ACF-2018-0003-0348>.

28 ⁹⁰ *See, e.g., id.*

V. HARM TO PLAINTIFFS

206. ACF’s unlawful decision to remove the ICWA and sexual orientation data elements deprives each Plaintiff of valuable information to which they are entitled by statute and regulation.

207. The Act requires Defendants to “disseminate the data and information made available through [AFCARS].” 42 U.S.C. § 679a(4); *see also* H.R. Rep. No. 99-1012 at 419 (1986), *as reprinted in* 1986 U.S.C.C.A.N. 3868, 4064 (purpose of the Clearinghouse is to “disseminate . . . research and data [on issues concerning adoption and foster care] as it becomes available to all those who voluntarily seek this information”).

208. If the ICWA and sexual orientation data were collected and disseminated, as required by the 2016 Final Rule, each Plaintiff would use the data in their daily operations to improve outcomes for children in the child welfare system, just as Congress intended. By unlawfully eliminating those data elements, the 2020 Final Rule prevents Plaintiffs from doing so.

209. Independently, as detailed further below, the 2020 Final Rule also harms each Plaintiff in other ways, including by forcing Plaintiffs to divert resources to address harms to their mission-driven activities; by impairing Plaintiffs’ ability to obtain funding; and by impeding the ability of tribal Plaintiffs and CTFC’s members, many of whom operate title IV–E agencies and are therefore directly regulated by the 2020 Final Rule, to provide child welfare services to their children and exercise their rights under ICWA.

A. California Tribal Families Coalition

210. The 2020 Final Rule’s removal of ICWA data elements harms CTFC by impeding its ability to carry out its mission to protect the health, safety, and welfare of tribal children, implement the recommendations of California’s ICWA Compliance Task Force, train child welfare workers, and obtain funding for its activities.

211. First, the removal of ICWA data impedes CTFC’s ability to allocate resources effectively and to design and advocate for legislation, regulations, and policies that target flaws in ICWA implementation. If armed with such data, CTFC would have a detailed, evidentiary record of the specific problems faced by child welfare agencies and state courts when implementing ICWA, which would in turn enable CTFC to craft appropriate policy solutions targeted at those

1 specific problems. As a direct result of the 2020 Final Rule, CTFC must instead pursue more
 2 expensive and less effective reforms.⁹¹

3 212. By removing the data elements on ICWA implementation, the 2020 Final Rule also
 4 deprives CTFC of persuasive, empirical evidence that it would use in its efforts to design and
 5 implement reforms. In the absence of such data, CTFC has historically encountered resistance
 6 from stakeholders who are reluctant to take action without empirical evidence of the need for
 7 reform. For example, when CTFC sought legislation to fund diversion programs for high risk
 8 AI/AN youth, the California Department of Finance—which analyzes legislative fiscal impacts—
 9 requested data on the population that would be served. Because CTFC was unable to provide the
 10 data, the legislation that was ultimately enacted provided a one-time funding allocation, rather
 11 than ongoing funding. By removing the ICWA data elements from AFCARS, the 2020 Final Rule
 12 renders CTFC’s advocacy efforts less effective and more time-consuming than they otherwise
 13 would be, diverting resources away from CTFC’s other activities, such as their work to ensure that
 14 tribes have access to legal counsel and the right to participate in courtroom proceedings
 15 concerning tribes, Indian families, and their children.

16 213. Second, the removal of ICWA data impedes CTFC’s ability to improve ICWA
 17 competency by training individuals that work in the child welfare system. If CTFC had access to
 18 the ICWA data removed by the Rule, which tracks how state child welfare agencies and state
 19 courts are implementing ICWA’s requirements, CTFC would be able to identify the most frequent
 20 and prevalent flaws in ICWA implementation. This would in turn allow CTFC to focus its finite
 21 training resources where they are most needed. As a direct result of the 2020 Final Rule, CTFC is
 22 unable to do so. The absence of such data therefore renders CTFC’s training services less effective
 23 and more time-consuming than they otherwise would be, diverting resources away from CTFC’s
 24 other activities.

25 214. Third, the 2020 Final Rule harms CTFC by impairing its ability to obtain funding.

27 ⁹¹ Task Force Report, *supra* n.2, at 98 (finding that the lack of data on ICWA compliance makes it
 28 “much more difficult for tribes to guide policy and budget allocation processes to ensure
 compliance”).

1 For example, without the data provided by the 2020 Final Rule, CTFC cannot provide data to
 2 support its own budgetary needs or support member tribe needs when negotiating allocations from
 3 state, federal or philanthropic sources.

4 215. The 2020 Final Rule also harms CTFC's member tribes by impairing their ability to
 5 protect and provide services to their children and vindicate their rights under ICWA. As discussed
 6 below regarding CTFC member Yurok Tribe, CTFC tribes provide child welfare services to
 7 citizens of their tribes, work with state child welfare agencies to ensure appropriate treatment and
 8 services, and participate in state court proceedings for tribal citizens. The absence of AFCARS
 9 data makes these efforts more expensive and less effective, as CTFC's member tribes must rely on
 10 anecdotal or incomplete information to identify their children in state child welfare systems, assess
 11 the care they are receiving, determine what actions state child welfare agencies have taken, and
 12 provide services and support to their children.

13 216. Additionally, as ACF recognized in the 2020 Final Rule, collecting the data would
 14 allow tribes to obtain "specific information regarding a child's tribal membership or ICWA
 15 applicability" for children who are or may be a member of their tribe. 85 Fed. Reg. at 28,413;
 16 *accord* 84 Fed. Reg. at 16,578. The availability of this information would allow CTFC's members
 17 to exercise their rights in each case involving their members, which would prevent the tribes and
 18 their citizens from losing their rights under ICWA. Without the information collected by ACF,
 19 CTFC's members are frequently unable to vindicate their rights or protect their children due to
 20 states' failures to provide them with the information directly. As the Task Force that led to
 21 CTFC's creation explained, this "systemic denial of civil rights that ICWA provides is a symptom
 22 of the fundamental breakdown of the systems that are failing tribal families and children across the
 23 country."⁹²

24 217. By inhibiting CTFC's member tribes' efforts to vindicate their ICWA rights and
 25 protect their children from adverse outcomes, the 2020 Final Rule injures CTFCs' members'
 26 sovereign interests. As Congress recognized in ICWA, the care of AI/AN children is "vital to the
 27

28 ⁹² *Id.* at 101.

1 continued existence and integrity of Indian tribes,” yet is threatened by the “alarmingly high
 2 percentage of Indian families [that] are broken up by the removal, often unwarranted, of their
 3 children from them by nontribal public and private agencies and [the] alarmingly high percentage
 4 of such children [that] are placed in non-Indian foster and adoptive homes and institutions.” 25
 5 U.S.C. § 1901(3)-(4). The removal of the ICWA data elements from the Final Rule impairs the
 6 ability of CTFC and its member tribes to realize the promise and progress of ICWA, and
 7 perpetuates the threats to the “continued existence and integrity of Indian Tribes” that Congress
 8 passed ICWA to end.

9 **B. Yurok Tribe**

10 218. The 2020 Final Rule’s removal of ICWA data elements harms the Yurok Tribe by
 11 impairing its ability to protect and provide services to Yurok children and vindicate its rights
 12 under ICWA.

13 219. First, the 2020 Final Rule harms the Tribe by impeding the ability of Yurok Health
 14 and Human Services (“YHHS”) to ensure that ICWA is properly implemented for its children and
 15 interfering with its sovereign interest in the health and well-being of its people and in ensuring that
 16 it retains connections to its members. Specifically, the 2020 Final Rule prevents tribes like Yurok
 17 from identifying recurring ICWA implementation issues and working with state title IV–E
 18 agencies to fix those problems. For example, state child welfare agencies have historically
 19 struggled to consistently identify Indian children, including Yurok children, and to provide timely
 20 notice of such cases to the child’s tribe. This problem would have been addressed by the 2016
 21 Final Rule, which included data elements designed to track and improve state title IV–E agencies’
 22 efforts to identify and notify tribes of Indian children. Among other things, the 2016 Rule required
 23 the agencies to report whether they inquired about a child’s ICWA status with a number of
 24 persons as required by ICWA (including, as applicable, the biological or adoptive mother, the
 25 biological or adoptive father, the child’s Indian custodian, the extended family, and the child who
 26 is the subject of the proceeding). *See* 81 Fed. Reg. at 90,535, 90,570 (codifying requirements at 45
 27 C.F.R. § 1355.44(b)(3)). The 2020 Final Rule harms Yurok by deleting most of those
 28 requirements, instead requiring agencies to report only whether they made any undefined

1 “inquiries” at all as to a child’s ICWA status. 85 Fed. Reg. at 28,424 (same). The 2020 Final Rule
 2 also does not identify the tribe of children who are ultimately determined to be eligible for
 3 ICWA’s protections. The removal of these data elements, along with others, will make it much
 4 more difficult for Yurok to assess whether the title IV–E agencies in its jurisdiction are actually
 5 making the inquiries required by ICWA, which in turn impedes YHHS’s ability to work with the
 6 agencies to improve the identification of the Tribe’s children—and increases the risk that Yurok
 7 children will simply be lost to the Tribe, harming its sovereign interests and contravening its rights
 8 under ICWA.

9 220. By impairing YHHS’s ability to ensure proper ICWA implementation, the 2020
 10 Final Rule interferes with the Tribe’s sovereign interests in keeping its children safe and within the
 11 tribal community. *See supra* ¶¶ 78-79, 88 (explaining that failures in ICWA implementation lead
 12 to adverse outcomes for tribal youth). For example, in a recent case, a state child welfare agency
 13 became aware of a Yurok child living in a dangerous home, but either failed to identify the child
 14 as a Yurok child or failed to provide the Tribe with timely notification of the case. As a direct
 15 result of that failure, the Tribe was unable to provide services to the child in a timely fashion. By
 16 the time YHHS became aware of the case and was able to intervene, events at the home had
 17 already escalated, resulting in severe injuries to the child. In such instances, proper ICWA
 18 implementation, including timely identification and notice, is critical because it provides Yurok
 19 the opportunity to protect its children and provide culturally appropriate services to families.

20 221. Second, the 2020 Final Rule impedes Yurok’s ability to accurately track the
 21 number and location of Yurok children in state care, which in turn impedes its ability to
 22 effectively administer its child welfare services through YHHS. Under the 2016 Final Rule, state
 23 child welfare agencies would have been required to report each child’s tribe as formally
 24 determined by the court. 81 Fed. Reg. at 90,570 (requiring agencies to report “the Indian tribe that
 25 the court determined is the Indian child’s tribe for ICWA purposes”). The 2020 Final Rule
 26 removed that data element, requiring state agencies to report only a list of tribes that “may
 27 *potentially* be the Indian child’s tribe(s).” 85 Fed. Reg. at 28,424 (emphasis added). This data
 28 element will not yield an accurate count of Yurok’s tribal children, as state child welfare agencies

1 are often over-inclusive when listing potential tribal affiliations at the outset of the ICWA inquiry
 2 process, including tribes of which the child is not an eligible member. Without the ability to track
 3 and count its children, Yurok cannot effectively plan for or administer the various social services
 4 offered through YHHS and the Yurok Wellness Court. For example, without an accurate count of
 5 Yurok children in state care, Yurok is unable to estimate the number of cases it may expect to
 6 transfer to tribal court as YHHS and the Court expand their programs, which in turn impedes a
 7 wide variety of planning decisions, such as how many caseworkers to hire.

8 222. Third, the 2020 Rule harms the Tribe's ability to obtain funding. As explained
 9 above, title IV-E of the Social Security Act is the principle statutory provision through which the
 10 federal government funds state and tribal child welfare agencies. *Supra* ¶ 54. While tribes have the
 11 option of being directly funded by the federal government, they may also be funded indirectly
 12 under a "pass-through agreement" with the state. The amount of funds Yurok receives from
 13 California under its pass-through agreement depends on the number of children the Tribe brings
 14 into tribal court under ICWA's transfer jurisdiction provision. But, as noted above, Yurok's ability
 15 to provide that information is impeded by the 2020 Final Rule. Similarly, the lack of data on the
 16 number of Yurok children in foster care impairs the Tribe's ability to obtain funding for the Yurok
 17 Wellness Court, which relies on such data to apply for other state and federal funding.

18 223. In the absence of a requirement that state child welfare agencies collect and report
 19 this data through AFCARS, Yurok Tribe is forced to expend significant staff time and resources
 20 attempting to track and count the number of Yurok children in the child welfare system on a
 21 county-by-county basis. This diverts valuable resources from YHHS's other work.

22 **C. Cherokee Nation**

23 224. The 2020 Final Rule's removal of ICWA data elements harms Cherokee Nation by
 24 impeding its ability to protect and provide services to Cherokee children, vindicate its rights under
 25 ICWA, and improve the treatment of Cherokee children and families involved in state child
 26 welfare systems.

27 225. First, the removal of ICWA data elements impairs Cherokee Nation's ability to
 28 effectively advocate for the tribal interests of Cherokee families and children in tribal and state

1 court systems. Through its Court Advocacy and Permanency Service (“CAPS”), Cherokee Nation
2 intervenes in cases involving Cherokee children to help secure and protect their rights under
3 ICWA. The 2020 Final Rule prevents CAPS workers from identifying recurring ICWA
4 implementation issues and working with state title IV–E agencies to fix those problems. The 2016
5 Final Rule would have required state agencies to submit detailed data tracking their
6 implementation of ICWA. If Cherokee Nation had access to that data, its CAPS workers would
7 focus on the most prevalent implementation issues when working with state agencies. For
8 example, if Cherokee Nation knew that a particular state frequently failed to place Indian children
9 in homes according to ICWA’s placement preferences, *see* 25 U.S.C. § 1915, its CAPS workers
10 would work with that state to improve its practices as a general matter, and would pay close
11 attention to placement in individual cases. As a direct result of the 2020 Final Rule, Cherokee
12 Nation is unable to do so. The absence of such data therefore renders Cherokee Nation’s CAPS
13 services less effective and more time-consuming than they otherwise would be, diverting
14 resources away from Cherokee Nation’s other activities.

15 226. Second, the removal of ICWA data impairs Cherokee Nation’s ability to provide
16 direct child welfare services to its children by impeding Cherokee Nation’s ability to identify
17 Cherokee children in state child welfare systems in a timely fashion. As explained above, *supra* ¶¶
18 88-91, state child welfare systems agencies have historically struggled to consistently and
19 accurately identify Indian children under ICWA in a timely fashion. Because Cherokee Nation is
20 the largest federally recognized tribe by population in the United States, state agencies tend to
21 over-identify children as potential members of the Cherokee Nation, notifying the tribe of a
22 significant number of cases that do not actually involve Cherokee children. Before the Nation can
23 provide its services in those cases, it must spend a significant amount of time determining whether
24 or not a child is actually eligible for tribal membership. In some instances, this process can take
25 months, which significantly delays Cherokee Nation’s ability to provide its services to Cherokee
26 children. This can have negative consequences for the children, as early intervention can be
27 critical to securing good outcomes. For example, if Cherokee Nation intervenes early in a case, its
28 CAPS workers can ensure that a child is placed in a stable, ICWA-compliant home (*e.g.*, in a tribal

home) in the first instance. In contrast, if Cherokee's intervention is delayed, the child may be placed in a non-ICWA compliant home by the state child welfare agency, only to be moved to an ICWA-compliant home once the Nation is able to intervene and protect the child's rights under ICWA. These kinds of outcomes are destabilizing and harmful to Cherokee children.

227. The 2016 Final Rule would have addressed these issues in several ways. To begin with, by requiring state child welfare agencies to report data on each of their inquiry efforts under ICWA, the 2016 Final Rule would have ensured that state agencies are actually making the full set of inquiries in the first place. *See supra* ¶ 167 (summarizing the 2016 Final Rule's inquiry data elements). Doing so would improve the speed and accuracy of the states' identification processes, which often over-identify children as Cherokee precisely because states do not make sufficient inquiries regarding the child's status in the first place. Additionally, if Cherokee Nation had access to data on the state agencies' implementation of those inquiry requirements, the Nation could work with states through its CAPS program to improve their identification processes. By removing the inquiry data elements, the 2020 Final Rule reduces Cherokee Nation's ability to improve the speed and accuracy with which their children are identified. This in turn impairs the Nation's ability to provide services to and protect its children, harming Cherokee Nation's sovereign interest in the health and well-being of its people

D. Facing Foster Care in Alaska

228. The 2020 Final Rule's removal of ICWA and sexual orientation data elements harms FFCA by impeding its ability to improve the foster care system, obtain funding for its activities, and provide services to foster youth and young adults involved in the child welfare system.

229. First, the removal of both types of data impairs FFCA's ability to effectively advocate for legislation, regulations, and policies that would improve outcomes and services for tribal and LGBTQ+ youth in the foster care system. Specifically, the removed data elements would help FFCA identify policies that would improve the foster care system by improving FFCA's understanding of the problems faced by tribal and LGBTQ+ youth and provide them with evidence that they could use in their advocacy efforts. With respect to tribal youth, the ICWA

1 implementation data would shed light on the precise ICWA protections that tribal youth in Alaska
2 are not receiving. For LGBTQ+ youth, the sexual orientation data would indicate how many
3 LGBTQ+ youth are in Alaska, which would provide an evidentiary basis to rebut assertions that
4 policy reform is unnecessary due to a supposed low number of LGBTQ+ youth. For both types of
5 youth, the ICWA and sexual orientation data would, when compared against data tracking other
6 outcomes (e.g., homelessness and abuse), indicate the extent to which those youth
7 disproportionately experience negative outcomes. If FFCA had access to such data, it would be
8 able to shape its policy agenda to better address the needs of both tribal and LGBTQ+ youth (and
9 LGBTQ+ AI/AN youth) in the foster care system, including efforts to reduce the over-
10 representation of both populations in care.

11 230. The removed ICWA and sexual orientation data would also improve FFCA's
12 ability to effectively advocate for reform by providing forceful and persuasive evidence that such
13 reform is necessary. For example, in its work to improve Alaska's judicial processes for foster
14 care through CIP, FFCA could cite to the removed ICWA data to advocate for reforms that would
15 improve the state courts' implementation of ICWA, such as by improving the timely identification
16 of relatives for placement. Similarly, in its current advocacy for a foster care bill of rights, FFCA
17 members could cite to the sexual orientation data to demonstrate the need for the right to be free
18 from discrimination on the basis of sexual orientation. By removing the ICWA and sexual
19 orientation data elements from AFCARS, the 2020 Final Rule renders FFCA's advocacy efforts
20 less effective and more time-consuming than they otherwise would be, forcing FFCA to divert
21 resources away from its other activities.

22 231. Second, the removal of the ICWA and sexual orientation data impedes FFCA's
23 ability to improve its direct services to youth, including the trainings it conducts for youth. If
24 FFCA had access to the abandoned data, it would better understand the needs of, and problems
25 faced by, both tribal and LGBTQ+ youth. This would allow FFCA to shape the content of its
26 trainings to address those needs. For example, if the removed sexual orientation data, when
27 compared against other AFCARS data elements, indicated that LGBTQ+ youth disproportionately
28 experience negative outcomes, such as homelessness, FFCA might adapt its training to include

1 content to address such issues. By removing the ICWA and sexual orientation data elements from
 2 AFCARS, the 2020 Final Rule renders FFCA's direct services less effective than they otherwise
 3 would be.

4 232. Third, the removal of the ICWA and sexual orientation data impedes FFCA's
 5 ability to improve trainings for adults involved in the child welfare system, including child welfare
 6 staff and foster parents. But for the 2020 Final Rule, FFCA would use the eliminated data to
 7 improve its trainings on the unique challenges faced by AI/AN children and the ways in which
 8 caregivers can provide safe and supporting environments for LGBTQ+ youth. Specifically, FFCA
 9 would rely on the data to convey the significance of challenges faced by tribal and LGBTQ+
 10 youths, would update the trainings to fully capture the nature of those challenges as reflected in
 11 the removed data, and would modify its recommendations regarding how to support youths
 12 accordingly. By removing the ICWA and sexual orientation data elements from AFCARS, the
 13 2020 Final Rule renders FFCA's training efforts less effective than they otherwise would be.

14 233. The 2020 Final Rule also harms FFCA by impairing its ability to obtain funding.
 15 Currently, FFCA is unable to apply for certain LGBTQ+-related grants that require applicants to
 16 submit information on the number of LGBTQ+ youth that would be served by the applicant. For
 17 example, FFCA would have applied for the Pride Foundation Grant (intended to support
 18 organizations serving LGBTQ+ populations) in past years in order to fund mental health services
 19 for LGBTQ+ youth, but was unable to do so because the grant application required information on
 20 the number of LGBTQ+ youth that FFCA would be able to serve in Alaska's foster care system.
 21 But for the 2020 Final Rule, FFCA would be able to apply for such grants going forward.

22 **E. Ark of Freedom Alliance**

23 234. The May 2020 Rule's removal of sexual orientation data elements impairs and
 24 frustrates AFA's mission and activities by impeding its ability to provide services to male and
 25 LGBTQ+ survivors of trafficking and other abuses, train law enforcement and other service
 26 providers, and obtain funding for its services.

27 235. First, the removal of sexual orientation data impedes AFA's ability to provide its
 28 direct services to male and LGBTQ+ youth. Specifically, having access to sexual orientation data,

1 along with other data tracked by AFCARS, would allow AFA to improve its preventative outreach
 2 and education services to male and LGBTQ+ youth, which rely on targeted interventions for the
 3 youth who are at risk of trafficking. Successful targeted interventions, in turn, require accurate
 4 data regarding the youth being trafficked, including, among other things, information on their
 5 demographics, the settings in which they are trafficked, and various other aspects about their
 6 experience. Such information not only allows AFA to locate and reach the youth in the first
 7 instance, it also allows AFA to tailor the content of their intervention and educational materials to
 8 reflect the demographics and culture of the specific youth. For example, interventions for
 9 cisgender, heterosexual girls will use markedly different language, anecdotes, and storytelling than
 10 interventions for boys who identify as LGBTQ+. If AFA had access to sexual orientation data,
 11 along with other AFCARS data elements (such as whether youth have been trafficked,⁹³ their
 12 gender, their race, and the type of living situation in which they are placed), it would have an
 13 improved understanding of the youth who are being trafficked in ways that would greatly improve
 14 its ability to target those youth and appropriately tailor its preventative outreach. As a direct result
 15 of the 2020 Final Rule, AFA will be unable to do so, rendering AFA's direct services less
 16 effective and more time consuming than they otherwise would be.

17 236. Second, the loss of the data impedes AFA's ability to improve its trainings for law
 18 enforcement and other service providers that interact with LGBTQ+ and marginalized youths. As
 19 noted above, if AFA had access to the removed sexual orientation data, in conjunction with
 20 AFCARS data on trafficking and other outcomes, it would better understand the extent to which
 21 LGBTQ+ youths are disproportionately impacted by human trafficking, homelessness, and
 22 violence, enabling it to more effectively train and educate adults in the community regarding how
 23 to identify and support such youths. Further, with data demonstrating the prevalence of trafficking
 24 among male and LGBTQ+ youth, AFA will be better positioned to communicate the importance

25
 26
 27 ⁹³ As noted above, title IV–E agencies are now required to report on survivors of trafficking.
 28 *Supra* ¶¶ 61, 116; 85 Fed. Reg. at 28,429 (requiring agencies to report whether a child has been
 the victim of sex trafficking in various contexts, as well as whether a child is experiencing
 homelessness).

1 of such training to law enforcement and service providers. Historically, trafficking has been
 2 misunderstood as a crime that impacts primarily cisgender girls, even though studies suggest that
 3 male and LGBTQ+ youth also fall victim of trafficking at significant and alarming rates.⁹⁴ These
 4 misconceptions make it difficult for law enforcement and other service providers to understand the
 5 severity of the danger for male and LGBTQ+ youth. By removing the sexual orientation data
 6 element from AFCARS, the 2020 Final Rule therefore renders AFA's education and training
 7 services less effective.

8 237. Third, the 2020 Final Rule also harms AFA by impairing its ability to obtain
 9 funding to provide its services. As noted above, trafficking is commonly misunderstood as a crime
 10 that largely impacts young girls. As a result, AFA encountered difficulty in convincing some
 11 private funders and grant providers to invest in projects that focus on preventing and addressing
 12 trafficking among male and LGBTQ+ youth. If AFA had access to comprehensive data
 13 demonstrating the prevalence of trafficking among such youth, it would be able to apply for more
 14 grants and submit stronger grant applications, thereby increasing its ability to obtain funding. For
 15 example, in a 2020 grant proposal submitted to Our Fund Foundation, AFA requested funding for
 16 a project that would provide housing and ancillary support services for LGBTQ+ youth who are
 17 victims of human trafficking, but was unable to provide data on the number of LGBTQ+ youth
 18 who experience trafficking when discussing the need for the project. If AFA had access to sexual
 19 orientation and trafficking data through AFCARS, its ability to obtain such funding would be
 20 greatly improved.

21 **F. Ruth Ellis Center**

22 238. The 2020 Final Rule's removal of sexual orientation data elements impairs and
 23 frustrates Ruth Ellis's mission and activities by impeding its ability to provide trauma-informed
 24 services to LGBTQ+ youth in Michigan, advocate for reforms that improve the treatment and
 25 outcomes of LGBTQ+ youth, including LGBTQ+ youth of color, and obtain funding for its
 26

27 ⁹⁴ See, e.g., *The Epidemic—Who*, Ark of Freedom Alliance, [https://www.aofalliance.org/the-](https://www.aofalliance.org/the-epidemic/who)
 28 [epidemic/who](https://www.aofalliance.org/the-epidemic/who) (last visited August 19, 2020) (discussing the prevalence of trafficking among male
 and LGBTQ+ youth).

1 services.

2 239. First, the removal of sexual orientation data impairs the ability of Ruth Ellis to
3 effectively advocate through the Ruth Ellis Institute for legislation, regulations, and policies that
4 would ensure that LGBTQ+ youth are safe and supported in the child welfare system. Specifically,
5 the removed data elements would help Ruth Ellis to identify the most effective policies by
6 improving Ruth Ellis's understanding of the problems faced by LGBTQ+ youth, especially with
7 respect to race, homelessness, and other barriers to health and well-being. Because the sexual
8 orientation data would indicate how many LGBTQ+ youth are in Michigan's child welfare system
9 and, when compared against data tracking other outcomes and aspects of identity, the extent to
10 which those youth disproportionately experience homelessness and other barriers to well-being,
11 Ruth Ellis would be better positioned to advance a policy agenda that addresses those barriers and
12 accounts for any differences by race.

13 240. The lost data would also improve Ruth Ellis's ability to advocate effectively for
14 reform by providing forceful and persuasive evidence that such reform is necessary. Historically,
15 Ruth Ellis has encountered resistance from state policymakers to certain proposed policies—such
16 as its proposal that Michigan reform its foster care licensing rules to require that bed assignments
17 be made based on where the child feels safest as opposed to the sex the child was assigned at
18 birth—because Ruth Ellis could not demonstrate that there were a sufficient number of LGBTQ+
19 children and youth in Michigan's system to justify the cost of reform. By removing the sexual
20 orientation data elements from AFCARS, the 2020 Final Rule renders Ruth Ellis's advocacy
21 efforts less effective and more time-consuming than they otherwise would be, forcing Ruth Ellis to
22 divert resources away from its other activities.

23 241. Second, the removal of sexual orientation data impedes Ruth Ellis's ability to
24 provide direct services to LGBTQ+ youth. If Ruth Ellis had access to the sexual orientation data,
25 in combination with data tracking other outcomes (*e.g.*, homelessness and placement outcomes), it
26 would be better positioned to assess the extent to which its pilot programs are successful in
27 improving the well-being of LGBTQ+ youth. For example, if Ruth Ellis had access to such data, it
28 could assess the impacts of its pilot program to help families accept the identity of their LGBTQ+

1 children by evaluating whether homelessness and placement outcomes improved over time for
 2 LGBTQ+ youth in the geographic areas included in the program, including reducing the over-
 3 representation of LGBTQ+ youth in care due to family rejection.

4 242. The 2020 Final Rule also harms Ruth Ellis by impairing its ability to obtain
 5 funding to provide its services. Both private funders and Michigan’s Department of Health and
 6 Human Services (“MDHSS”), which funds many of Ruth Ellis’s services through government
 7 contracts, are reluctant, and often unwilling, to provide grants or contract for services without data
 8 that shows how many LGBTQ+ youth will be served. Similarly, Ruth Ellis would almost certainly
 9 be able to expand several of its programs if AFCARS required child welfare agencies to collect the
 10 sexual orientation data. For example, Ruth Ellis is currently conducting a pilot program in three
 11 counties to train social workers and other professionals working within the child welfare system
 12 on how to collect sexual orientation and gender identity data—which will in turn be useful for
 13 Ruth Ellis’s other activities once collected—in a manner that is culturally competent and
 14 affirming. If all child welfare agencies in Michigan were required to collect and report those data
 15 to AFCARS, MDHSS would likely fund an expanded program to ensure that other counties
 16 receive training on data collection.

17 **G. True Colors, Inc.**

18 243. The 2020 Final Rule’s removal of sexual orientation data elements impairs and
 19 frustrates True Colors’ mission and activities by impeding its ability to provide services to
 20 LGBTQ+ youth in the child welfare system.

21 244. Specifically, the removal of sexual orientation data impedes True Colors’ ability to
 22 provide mentoring programs, social activities, and leadership programs to LGBTQ+ youth in
 23 Connecticut’s child welfare system. But for the 2020 Final Rule, True Colors would use the
 24 eliminated sexual orientation data to determine the effectiveness of its efforts to reach LGBTQ+
 25 youth and to ensure that they have access to its services. Currently, True Colors relies on social
 26 workers and other professionals in the system to refer LGBTQ+ youth to the organization. While
 27 True Colors knows that many LGBTQ+ youth in Connecticut’s system are not identified or
 28 referred for services, it has no way of knowing how many such youth there are or where they are

1 located. If child welfare agencies in Connecticut collected sexual orientation data through
2 AFCARS, Connecticut’s Department of Children and Families (“DCF”) would know how many
3 LGBTQ+ youth were in their system and would be able to work with True Colors to provide youth
4 with the opportunity to receive services.

5 245. Additionally, True Colors’ ability to successfully recruit affirming foster parents is
6 hindered by a lack of data on the sexual orientation of foster and adoptive parents that are already
7 in the system. Currently, when seeking to find a home for an LGBTQ+ youth, True Colors has
8 recruited families through informal networks and connections. If child welfare agencies in
9 Connecticut were required to collect sexual orientation of foster and adoptive parents, DCF would
10 have access to data on a pool of LGBTQ+ foster and adoptive parents. True Colors could then
11 work with DCF—which funds True Colors’ foster parent recruitment program—to more easily
12 identify potential supportive homes for LGBTQ+ youth to improve permanency outcomes for
13 them and avoid congregate where possible.

14 246. The 2020 Final Rule also harms True Colors by impairing its ability to obtain
15 funding for increased services to LGBTQ+ youth. If True Colors had data on the number of
16 LGBTQ+ youth in Connecticut, it would use the data to persuade stakeholders to increase
17 services. In the past, through its Safe Harbor Project, True Colors has encountered resistance from
18 DCF to fund certain proposed projects because True Colors could not demonstrate that there were
19 a sufficient number of LGBTQ+ youth to justify the cost of the projects. For example, in past
20 years, True Colors has sought funding from DCF to establish a congregate care facility that would
21 be certified as safe for LGBTQ+ youth and staffed with employees who are culturally competent
22 and affirming. Such a facility would fill an important gap in services for LGBTQ+ youth, who are
23 more likely to end up in congregate care settings due to a lack of affirming foster homes and who
24 are significantly more likely to experience harassment, discrimination, and violence in congregate
25 care settings than their non-LGBTQ+ peers.⁹⁵ However, because funding for such facilities
26 depends on the number of children they would serve, and because True Colors could not provide
27

28 ⁹⁵ See, e.g., Equality N.C. ANPRM Comment.

any data on the number of LGBTQ+ youth in Connecticut's child welfare system who would benefit from the facility, DCF could not fund the project. If True Colors had access to sexual orientation data through AFCARS, it would have data on the number of LGBTQ+ youths in Connecticut and would be better positioned to secure funding for increased services. Instead, as a direct result of the 2020 Final Rule, True Colors is unable to rely on sexual orientation data to seek funding for LGBTQ+ youth services.

247. In the absence of a requirement that state child welfare agencies collect and report sexual orientation data through AFCARS, True Colors will now have to work to obtain state-level data collection requirements. As a direct response to ACF's removal of the sexual orientation data elements, True Colors has already expended, and will continue to expend, significant staff time and resources towards advocating for state legislation that will require Connecticut's child welfare agencies to collect sexual orientation data. These resources are being diverted from True Colors' other work.

VI. CLAIM FOR DECLARATORY AND INJUNCTIVE RELIEF

COUNT ONE VIOLATION OF THE ADMINISTRATIVE PROCEDURE ACT, 5 U.S.C. §§ 706(2)(A)

248. Plaintiffs re-allege and reincorporate the paragraphs above as fully set forth herein.

249. The APA requires that a reviewing court "hold unlawful and set aside agency action, findings, and conclusions found to be . . . arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. §§ 706(2)(A).

250. The 2020 Final Rule was arbitrary and capricious because Defendants failed to provide adequate reasoned analysis, properly balance costs and benefits, consider and respond to comments, consider all relevant statutory factors, consider reasonable alternatives, acknowledge that no underlying facts had changed since 2016, explain inconsistencies between their position and the full record of research and policy findings before it, and acknowledge or justify their changes in position.

251. Additionally, Defendants acted contrary to their statutory obligation to implement a data collection system that

shall . . . provide comprehensive national information with respect to (A) the demographic characteristics of adoptive and foster children and their biological and adoptive or foster parents, (B) the status of the foster care population, . . . [and] (D) the extent and nature of assistance provided by Federal, State, and local adoption and foster care programs and the characteristics of the children with respect to whom such assistance is provided.

42 U.S.C. § 679(c)(3).

252. Accordingly, the 2020 Final Rule should be vacated as arbitrary and capricious.

PRAYER FOR RELIEF

WHEREFORE, Plaintiffs pray that this Court:

- (1) Declare that the Final Rule violates the APA and the Social Security Act;
- (2) Issue an order holding unlawful and setting aside the Final Rule;
- (4) Award Plaintiffs their attorneys' fees and costs pursuant to 28 U.S.C. § 2412; and
- (5) Grant such other and further relief as this Court deems proper.

Dated: August 27, 2020

Respectfully submitted,

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